163 U.S. 711

EXTRACTS FROM TRANSCRIPT OF RECORD.

163-711

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 727.

THE WAYNE LUMBER COMPANY, PLAINTIFF IN ERROR,

vs.

CALVIN F. COLLINS AND FRANK C. BREWER, SURVIVING PARTNERS OF C. F. COLLINS & COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

RECORD FILED SEPTEMBER 11, 1895.

(16,017.)

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UNITED STATES OF AMERICA:

In the Supreme Court of the United States, October Term, 1895.

C. F. COLLINS & Co., Respondents in Error,
vs.
WAYNE LUMBER COMPANY, Plaintiff in Error. } Assignment of Errors.

Now, at this day, comes the plaintiff in error in the above-entitled cause and suggests to the court that error hath intervened in the final adjudication by the supreme court of Missouri or by one of the branches thereof, to wit, the branch or division known as division No. 2, and as grounds of error respectfully assigns the following:

I.

The judgment of the court of first instance was erroneous in that it deprived defendant of its property, as is more particularly stated below.

II.

If the present judgment in this cause should be permitted to stand, it amounts to giving valuable property of the defendant to the plaintiff without any compensation therefor.

III.

Because such judgment violates the property rights of the defendant as guaranteed by sections 20 and 30 of the bill of rights of the constitution of Missouri and the fifth amendment of the Constitution of the United States.

IV.

That in view of the importance of this question the matter should be passed upon by the whole court instead of one division thereof, and to the end that justice may be done and not defeated.

V.

The actual value of the property taken is wholly immaterial, since if the right exists to deprive defendant of a single piece of lumber of the smallest value without due compensation, the same right could be applied to its entire property of every kind and character.

VI.

The forthcoming bond given in a replevin suit stands in lieu of the property seized, and plaintiff has no right to hold the property or any part thereof and at the same time recover on the bond, and such a recovery as was had in this case is violative of the provis-

ions of the constitution of this State and of the United States to which we have heretofore called attention.

Wherefore plaintiff in error prays the court to inquire of the premises, and that upon being fully advised of and concerning the same that this action be reversed and remanded with directions to the supreme court of Missouri to reverse and remand said cause with directions to the court of first instance to retry the cause, and that it ascertain defendant's interest in the property taken by the plaintiffs.

Respectfully submitted.

HOUGH & HOUGH &
C. D. YANCEY,
Att'ys for Pl'ff in Error.

* * * * * * *

(Record, page 31.)

In the Circuit Court of Wayne County.

STATE OF MISSOURI, } ss:
County of Wayne, }

CULVIN F. COLLINS and FRANK C. BREWER, Surviving Partners of Culvin F. Collins, Willard D. Brewer, and Frank C. Brewer, Partners as C. F. Collins and Company, Plaintiffs,
vs.
THE WAYNE LUMBER COMPANY (a Corporation), Defendant.

Amended Petition.

Plaintiffs state that Culvin F. Collins, Willard D. Brewer, and Frank C. Brewer were at the times hereinafter mentioned parties engaged in business under the firm name and style of C. F. Collins and Company, but that said W. D. Brewer has departed this life and that they are the surviving partners of said firm.

That defendant is and was at the times hereinafter mentioned a corporation duly organized and existing under the laws of the State of Missouri.

Plaintiffs further state that on, to wit, the 8th day of August, A. D. 1891, said firm, composed as aforesaid, was lawfully entitled to the possession of certain goods and chattels of the value of, to wit, twenty thousand dollars ($20,000.00), and which said goods and chattels are more particularly described as follows, to wit:

Yellow Pine Lumber Situated at Clearwater, in said County of Wayne, Missouri.

Pile No.	1	....	Tied flooring in shed.		30,000
"	6	.....	Star & clear.....		7,000
"	7	1 x 6	" "		6,000
"	8	1 x 6	" "		10,000
"	9	1 x 4	" "		45,000

	Pile No.	10	1 x 4 & 6.....	Star & clear.....		15,500
	"	11	1 x 4	" "		15,000
	"	13	1 x 6	" "		16,250
	"	12	1 x 6	" "		19,000
	"	14	1 x 8 to 12"–14'..	Common		12,000
	"	15	1 x 8 to 12"–12'..	"		12,000
	"	15½	1 x 10 to 16', 12 to 16'	Star & clear.....		8,000
	"	16	1 x 8 to 12"–14'..	Common		15,000
	"	16½	1 x 6–14'...	Star & clear.....		4,000
2	"	17	1 x 12–16'.....	Common		50,000
3	"	18	1 x 12–16'.....	"		75,000
3	"	19	1 x 8–16'... ...	"		60,000
3	"	20	1 x 10–16'.....	"		62,000
2	"	21½	1 x 10–16'.....	"		48,000
2	"	21	1 x 6–12 to 16'...	Star & clear.....		32,000
	"	22	1 x 6–12 to 16'...	" "		7,500
	"	23	2 x 4–14'.....	2,013 pieces		18,117
	"	25½	2 x 4–12'.... ...	1,914 "		15,312
	"	24	1 x 4–10'.....	1,012 "		3,373
2	"	25	2 x 12–14'.....	1,680 "		47,040
3	"	26	2 x 12–24'.....			40,000
	"	27	2 x 10–20'.....	108 "		3,600
	"	28	2 x 6–20'.....	280 "		5,600
	"	29	1 x 6–16'.....	1,660 "		13,280
	"	29½	1 x 6–12'.....	400 "		2,400
2	"	30	2 x 6–16'.... ...	2,996 "		47,936
	"	31	2 x 6–18	560 "		10,080
2	Pile No.	32	2 x 8–16'.....	1,452 pieces		30,492
2	"	33	2 x 12–16'.....	1,888 "		60,416
2	"	34	1 x 4–12 to 16'...	7,000 "	mostly 16 star & clear	37,333
	"	35	2 x 8–20'.....	350 "		9,450
	"	36	2 x 10–14'.....	374 "		8,602
2	"	37	2 x 10–16"	1,224 "		33,048
2	"	38	2 x 4–16'.....	4,760 "		52,360
	"	39	2 x 6–12'.....	609 "		7,308
2	"	43	2 x 12–16'.....	1,860 "		59,520
	"	44	2 x 4–18'.....	4,385 "		52,620
	"	45	2 x 4–16'.....	2,326 "		25,696
	"	46	1 x 4–16'.....	3,978 "		21,216
	"	47	1 x 4–14'.....	2,080 "		9,707
	"	49	1 x 4–14'.....	3,317 "		15,479
	"	53	2 x 10–16'.....	1,008 "		27,216
	"	54	2 x 4–10'.....	1,276 "		8,932
	"	55	2 x 12–12'.....	832 "		19,968
	"	56	1 x 4–10'.....	2,260 "		7,533
	"	57	1 x 4–12'.... ...	2,776 "		11,104
	"	58	1 x 4–14'.....	2,250 "		10,500
	"	59	2 x 10–12'.....	226 "		4,520
	"	61	1 x 4–16'	2,464 "		13,140

	Pile No.	63	1 x 6–14′	1,320	pieces		9,240
	"	64	1 x 4–12′	2,400	"		9,600
	"	65	2 x 10–12′	280	"		5,600
	"	66	2 x 6–18′	510	"		9,180
	"	67	1 x 4–16′	4,148	"		22,123
	Pile No.	68	1 x 4–16′	2,607	pieces		13,904
	"	69	1 x 4–16′	4,218	"		22,496
	"	70	2 x 10–12′	42	"		840
	"	73	2 x 8–18′	242	"		5,808
	"	74	1 x 4–16′	2,822	"		15,051
	"	75	1 x 4–16′	2,730	"		14,560
	"	76	1 x 4–16′	1,470	"		7,840
2	"	79	2 x 4–18′	4,412	"		53,044
2	"	80	1 x 6–12 to 16′	4,536	"		34,000
	"	81	4 x 4–12 to 16′	360	"		7,000
	"	82	1 x 12–12 to 16′	936	"	star & clear	14,000
	"	83	1 x 8–16′	810	"	" "	8,910
2	"	84	1 x 8 to 12–12 to 14″	608	"	" "	7,200
	"	85	1 x 4–16′	3,842	"	" "	20,491
	"	86	1 x 4–12 & 14′	1,161	"		5,000
	"	87	2 x 8, 10 & 12″–16′	100	"	star & clear	2,700
	"	88	2 x 8, 10 & 12–16′	138	"	" "	3,800
	"	89	1 x 10–16′	510	"	" "	6,630
	"	90	2 x 12–16′	832	"		26,624
3	"	91	1 x 4–16′	9,874	"	star & clear	52,661
2	"	92	1 x 10–16′	3,800	"		50,667
2	"	93	2 x 12–16′	1,900	"		60,800
	"	94	2 x 8 to 12′–14′	612	"		5,000
	"	95	2 x 8–12′	510	"		8,160
	Pile No.	96	2 x 10–14′	704	pieces		16,192
	"	97	2 x 10–12′	800	"		16,000
	"	98	2 x 8–14′	576	"		10,944
	"	99	2 x 12–14′	108	"		3,024
	"	100	1 x 8–16′	1,045	"		11,495
	"	101	1 x 8–18′	176	"		2,112
2	"	102	2 x 10–16′	2,261	"		61,047
	"	104	2 x 6–14′	644	"		9,016
2	"	105	1 x 12–16′	3,536	"		56,576
	"	106	1 x 8 to 12′–12′	1,848	"		19,000
	"	107	1 x 12–20′	250	"		5,000
	"	108	1 x 8–20′	100	"		1,300
	"	109	1 x 10–20′	150	"		2,500
	"	110	1 x 10–18′	315	"		4,725
	"	111	1 x 12–18′	792	"		14,256
	"	112	1 x 8 to 12″–12′	960	"		10,000
	"	113	4 x 6–12′ to 18′	546	"		16,000
	"	114	4 x 4–12 to 18′	684	"		15,000
	"	115	1 x 6–12′	942	"		5,652
	"	116	6 x 6–16′	140	"		6,720
	"	117	6 x 6–12′	80	"		2,880

	Pile No. 118	6 x 6–14′.....	19	pieces	798
	" 119	4 x 6–12	44	"	1,056
	" 120	4 x 6–18′.....	130	"	4,680
	" 121	1 x 4 12 to 16′...	1,924	pieces, mostly 16 star & clear ..	9,000
	" 121½	1 x 6–16′.....		" " " " ..	4,000
	" 122	1 x 4–12 to 16′...	2,030	" " " " ..	10,000
	" 123	1 x 4 12 to 16′...	1,240	" " " " ..	6,000
	Pile No. 124	1 x 4 12 to 16′...	1,980	pieces, mostly 16 star & clear ..	9,500
	" 125	1 x 4 12 to 16′...	In mill	" " " ..	15,000
3	" 126	4 x 6–12 to 124′.....			4,000
	" 127	2 x 4–20′.....	1,440	pieces	18,720
2	" 128	1 x 4–12 to 16′...	7,128	pieces, mostly 16 star and clear.	38,016
2	" 129	1 x 4–16′.....	7,600	" " " " .	40,533
2	" 130	1 x 4–16′	5,362	pieces	28,597
2	" 131	1–12–16′	3,587	"	57,392
2	" 132	1 x 4–12 to 16′...	7,761	pieces, mostly 16 star and clear.	38,000
	" 133	2 x 10–16′.....	324	pieces	8,748
2	" 134	2 x 4–16′.....	4,112	"	45,232
2	" 135	1 x 6 12 to 16′...	5,494	pieces, star & clear	38,000
"	" 136	1 x 10–16′.....	270	"	3,590
3	" 137	1 x 4–12 to 16′...	11,268	pieces, mostly 16 star and clear.	56,000
	" 138	1 x 4–12 to 16′...	2,476	" " " " .	12,000
	" 139	1 x 6 12 to 16′...	425	" " " " .	3,000
	" 140	2 x 4–14′.....	1,147	pieces	10,323
2	" 141	1 x 12–16′.....	1,992	"	31,872
	" 142	2 x 4–12′...	729	"	5,832
	" 143	2 x 4–18′.....	384	"	4,608
2	" 144	2 x 12–16′... ...	640	"	20,480
3	" 145	2 x 4–16′.....	4,624	"	50,864
	" 146	2 x 4–16′.....	3,285	"	36,135

Total amount of feet..... 2,686,492

That afterwards, on the said 8th day of August, A. D. 1891, said defendant wrongfully took said property from the possession of the said firm, composed as aforesaid, and still unjustly detains the same in said county of Wayne, to the damage of plaintiffs in the sum of $20,000.00.

Wherefore plaintiffs demand judgment against defendants for the recovery of the possession of said goods and chattles and five thousand dollars' damages for their taking and detention; and in case a delivery of said property cannot be had, then plaintiffs pray judgment for the sum of $20,000, the value thereof.

(Signed) DICKSON & SMITH,
With MARTIN L. CLARDY,
RANEY & CARTY,
Attorneys for Plaintiffs.

* * * * * * *

(Record, page 9.)

Affidavit to Petition.

And on the said 12th day of August, 1891, there was filed with said petition the affidavit of one Willard D. Brewer as follows, to wit:

In the Circuit Court of Wayne County, February Term, A. D. 1892.

CALVIN F. COLLINS, WILLARD D. BREWER, and FRANK C. BREWER, Partners as C. F. Collins and Company, Plaintiffs,
vs.
THE WAYNE LUMBER COMPANY (Corporation), Defendant.

Willard D. Brewer, one of the plaintiffs in the above-entitled cause, being duly sworn, on his oath says:

First. That said plaintiffs are the owners and entitled to the possession of the following-described property, to wit:

* * * * * * *

Second. That said property is wrongfully detained from the plaintiffs by the said defendant.

Third. That said property is of the actual value of twenty thousand dollars ($20,000.00).

Fourth. That said property has not been seized under any process, execution, or judgment against the property of the said plaintiffs, Calvin F. Collins, Willard D. Brewer, or F. C. Brewer, or said firm of C. F. Collins & Company.

Fifth. That plaintiffs will be in danger of losing said property unless it is taken out of the possession of the defendant or otherwise secured.

(Signed) W. D. BREWER.

[SEAL.] Subscribed and sworn to before me this 12th day of August, A. D. 1891.

(Signed) J. B. McGHEE,
Clerk of Wayne Co. Cir. Ct.

(Record, page 15.)

Bond in Replevin.

And on said 12th day of August, 1891, there was also filed on behalf of said plaintiffs the following bond, to wit:

"Know all men by these presents that we, Calvin F. Collins, Willard D. Brewer, and Frank C. Brewer, composing the firm of C. F. Collins & Co., as principal, and the American Surety Company, as surety, are held and firmly bound unto the Wayne Lumber Company in the just and full sum of forty thousand dollars; to the payment whereof we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of August, 1891.

The condition of the above obligation is as follows:

Whereas the said C. F. Collins & Co. have commenced a suit in the circuit court of the county of Wayne against said Wayne Lumber Company, returnable to the February term, 1892, of said court, for the recovery of certain personal property, described in the petition of said plaintiffs as follows, to wit, certain 146 piles of yellow-pine lumber, amounting to two million six hundred and eighty thousand and ninety-two feet, and now on the premises of the said Wayne Lumber Company at Clearwater, Missouri, and an order has been made in said case by the judge of said court requiring said defendant to deliver the said property above described to the sheriff of the county of Wayne, and if the same be not delivered that the said sheriff of the county of Wayne take the same from the said defendant and deliver it to the said plaintiffs:

Now, if the said C. F. Collins & Co., plaintiffs, shall prosecute said action with effect and without delay and return the property to defendant, if return thereof be adjudged, or in default of such delivery shall pay the assessed value of such property, then said obligation to be null and void; otherwise to remain in full force and effect.

(Signed) C. F. COLLINS & CO., [SEAL.]
By W. D. BREWER.
W. D. BREWER. [SEAL.]
C. F. COLLINS. [SEAL.]
F. C. BREWER. [SEAL.]
THE AMERICAN SURETY COMPANY OF NEW YORK,
By CHAS. H. TURNER,
Resident Vice-president.

[SEAL.] Attest:
M. STODDORT,
Resident Assistant Secretary.

(Record, page 17.)

Order of Delivery.

And on said 12th day of August, 1891, the following order of delivery was made in said cause, to wit:

In the Circuit Court of Wayne County, State of Missouri, — Term, 18—.

CALVIN F. COLLINS, WILLARD D. BREWER, and FRANK C. BREWER, Partners as C. F. Collins & Co.,
vs.
WAYNE LUMBER COMPANY.

Order of Delivery by Clerk in Vacation.

The petition and affidavit of Culvin F. Collins, Willard D. Brewer, — Frank C. Brewer, the plaintiffs in the above-entitled cause, being

seen and heard by the undersigned clerk, it is hereby ordered that the above-named defendant, Wayne Lumber Company, deliver to the sheriff of said county the goods, chattels, and property specified in the affidavit filed with the petition in the above-entitled cause and described as follows, viz., certain 146 piles of yellow-pine lumber, amounting to 2,686,492 feet, and now on the premises of said Wayne Lumber Company, situated at Clearwater, Missouri, and that if said defendant do not deliver said property in obedience to this order the said sheriff shall take said property from the possession of the said defendant and deliver the same to the said plaintiff.

Witness my hand as clerk of the circuit court of Wayne county, with the seal thereof hereto affixed, at office in Greenville, this 12th day of August, 1891.

(Signed) J. B. McGHEE,
Circuit Clerk.

(Record, page 18.)

Sheriff's Return.

Upon which said order of delivery the sheriff of Wayne county thereafter made the following return, to wit:

"*Sheriff's Return.*"

Executed the within writ by taking the within specified goods, chattels, and property from the lumber company and delivering to the plaintiffs, C. F. Collins & Company, and after serving said writ the Wayne Lumber Company give bond and retained said property.

(Signed) JOHN H. JOHNSON,
Sheriff of Wayne County.

* * * * * * *

(Record, page 20.)

Defendant's Delivery Bond.

"In the Circuit Court of Wayne County, Missouri," to February Term, 1892.

CULVIN F. COLLINS, WILLARD D. BREWER, and FRANK C. BREWER, Partners as C. F. Collins & Co., Plaintiffs,
vs.
THE WAYNE LUMBER COMPANY (a Corporation), Defendant. } Bond.

Know all men by these presents that the Wayne Lumber Company, as principal, and Douglas M. Storrs, Geo. A. Withers, H. C. Withers, D. J. Allen, and John M. Bryden, as securities, acknowledge themselves to owe and stand indebted to the plaintiffs aforesaid in the just and full sum of forty thousand dollars, payment

whereof, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators.

Sealed with our seals and dated below.

To be void, however, upon the conditions hereunder written:

Whereas the said C. F. Collins and Company, under and by virtue of an order of delivery issued out of the clerk's office of the circuit court within and for the county of Wayne and State of Missouri and directed and delivered to the sheriff of said Wayne county, bearing date August 12th, 1891, have caused and procured said sheriff to take and seize upon a large amount of lumber, to wit, 113 stacks, more or less, as will appear by his return to and indorsed upon said writ, and to which said return reference is here made for a more full and accurate description of said property:

Now, therefore, if the said Wayne Lumber Company shall deliver the said property to the plaintiffs, if said delivery be adjudged, or, in default of such delivery, it shall pay to said plaintiffs the assessed value of said lumber and pay all damages for injuries to the property and for the taking and detention on detention thereof and all costs which may accrue in the above action, then the above obligato be void; otherwise to remain in full force and effect.

In testimony whereof we have hereunto set our hands and seals this 17th day of September, 1891.

WAYNE LUMBER CO.,
By DOUGLAS M. STORRS, *Pres.* [SEAL.]
DOUGLAS M. STORRS. [SEAL.]
GEO. A. WITHERS. [SEAL.]
H. C. WITHERS. [SEAL.]
D. J. ALLEN. [SEAL.]
J. M. BRYDEN. [SEAL.]

Attest:
[L. S.] GEO. A. WITHERS, *Sec'y.*

The above bond has been taken and approved by me this 17th day of September, 1891.

JOHN H. JOHNSON,
Sheriff Wayne Co., Mo.

(Record, page 21.)

And afterwards, to wit, on the — day of September, 1891, said sheriff amended the said return by him made on said order of delivery as follows, to wit:

Sheriff's Amended Return.

I hereby certify that I served the within writ in said county of Wayne on the -- day of August, 1891, by demanding from the officers of the defendant, The Wayne Lumber Company, the possession of the lumber described within, and that the possession thereof was by defendant refused, and that I afterwards took from the possession of the defendant's officers one hundred and thirteen (113)

stacks of lumber situated at Clearwater, Wayne county, Missouri, more particularly and specifically described as follows:

* * * * * * *

And that the defendant, The Wayne Lumber Company, executed to me a delivery bond, which was by me approved, and is herewith returned, and that I thereupon delivered to the possession of the defendant the said above described lumber, excepting six car-loads of lumber originally seized, amounting to 71,222 feet, which I delivered to the plaintiffs, C. F. Collins & Co., and did not return to defendants on the approval of its delivery bond.

JOHN H. JOHNSON,
Sheriff of Wayne County, Mo.

(Record, page 26.)

And afterwards, to wit, at the February term, A. D. 1892, of the said circuit court of Wayne county, and within due time, the said defendant filed its answer and counter-claim in the words and figures following, to wit:

Answer and Counter-claim.

Circuit Court of Wayne County.

C. F. COLLINS *et al.*
vs.
WAYNE LUMBER COMPANY.

Answer and Counter-claim of Defendant.

Now comes the defendant and (by) leave of court files its answer (to) the petition of the plaintiff herein and states:

First. Defendant denies each and every allegation, averment, and statement of fact contained and set forth in said petition as fully as if the same were literally set forth and specifically denied.

Second. Further answering, the defendant says that on the 15th day of February, 5th day of May, and the 3rd day of June, 1891, the plaintiff by covin and deceit obtained from defendant certain pretended bills of sales embracing a large amount of lumber then manufactured and in stock at defendant's yards at Clearwater, Missouri, purporting to be conveyances and delivery of the lumber therein described, when in truth and in fact said pretended bills of sale were understood and intended by the said parties at the time of the execution and delivery of the same to be only an equitable lien or mortgage to secure the sum of five dollars per thousand feet, advanced on said lumber as part of the purchase price thereof, pursuant to the terms of a contract made and entered between plaintiff and defendant on the 7th day of November, 1890, until such lumber should be shipped out on the order of the plaintiff, when the balance of the purchase thereof should become due and payable by plaintiff to defendant on the 5th day of each month for the previous months' shipments.

That at and prior to the commencement of this action plaintiff had wilfully violated and broken all the terms and conditions of said contract and of said equitable mortgage by refusing to order the shipments of said lumber, and by refusing to advance money at the rate of five dollars per thousand feet for the lumber cut by defendant under and pursuant to the terms of said contract, and by refusing to pay for said lumber.

That defendant had at all times faithfully observed, obeyed, and performed all and every the conditions of said contract on its part, as also the conditions of said equitable mortgage, and was at all times ready and willing to complete and perform the same in all respects.

Yet plaintiffs now wrongfully, fraudulently, and without right claim and pretend that the said pretended bills of sale were and are conveyances of the lumber therein described, and by such false and fraudulent pretenses and claims seek to recover and hold the whole of said lumber without payment of the contract price therefor, and when in truth and in fact the said pretended bills of sale did not vest the title of said lumber in plaintiffs nor give them possession thereof, nor were the same intended or understood so to do.

Third. Further answering, defendant says that at the time of the commencement of this action it was the sole and absolute owner of the lumber in the petition described, and of the whole and every part thereof, and entitled to immediate and exclusive possession thereof, and defendant demanded the return of said property to it be adjudged, and that its damages for the taking and detention by the plaintiff be assessed, and if a return of the property cannot be had that it have judgment therefor.

Further answering, by way of counter-claim defendant says that on the 7th day of November, 1890, it entered into a contract in writing with plaintiffs, by the terms of which it agreed and understood to buy, receive, and pay for the entire cut and product of lumber at defendant's mills at Clearwater, Missouri, during the whole of the years 1891 at and for the prices fixed and set forth on the reverse side of said contract, a copy of which, excepting the signatures, is hereto attached and herewith filed, marked "Exhibit A."

That in and by the terms of said contract plaintiffs undertook and promised and agreed to and with defendant to pay to defendant by way of advance the sum of five dollars per thousand feet in part payment for the lumber so to be cut and stacked by it during the year aforesaid at any time as the wants of defendant might require.

That the defendant, under said contract, during the year 1891 cut and stacked a large amount of lumber of the kinds described in said contract, to wit, more than seven million feet, and stacked said lumber at Clearwater, Missouri, and for it was entitled to receive the prices per thousand feet as by said contract provided.

That plaintiff wrongfully and in violation of the terms of said contract refuses to buy, receive, or pay for six million five hundred

thousand feet of said lumber and wrongfully refuses to pay said advance of five dollars per thousand feet, and by reason of said refusal defendant was compelled to sell said lumber and the whole thereof at prices far below the prices agreed by plaintiff to be paid therefor, at the price and sum of two dollars and a half per thousand feet below the prices as fixed and stipulated in and by said contract, thereby and by reason thereof causing a direct loss to defendants of the sum of sixteen thousand two hundred and fifty dollars, for which defendant asks judgment.

Second. For a further cause of action and by way of counter-claim defendant says that in the month of June, 1891, plaintiff bought of defendant and defendant sold and delivered to plaintiff one car-load of lumber, of the value of ninety dollars, for which it asks judgment, etc.

(Signed) CHAS. D. YANCEY,
DINNING & BURNES,
SETTLE & BUGG,
Attorneys for Defendant.

And upon filing of such answer and counter-claim defendant was granted leave to file an amended answer and counter-claim at any time before sixty days preceding the next regular term of the circuit court of Wayne county, and said cause was continued to the next term of said court and entries of said leave and continuance duly made upon the records of said court.

And thereafter and in due time, not having amended its said answer or counter-claim, but choosing to stand upon the same as filed aforesaid, plaintiff filed thereto the following reply, to wit:

(Record, page 30.)

Replication to Answer and Counter-claim.

In the Circuit Court of Wayne County.

C. F. COLLINS *et al.*, Plaintiffs.
vs.
THE WAYNE LUMBER COMPANY, Defendant.

Now come the plaintiffs and for reply to the new matter set up in the answer of defendant and by way of counter-claim deny each and every allegation thereof.

Wherefore plaintiffs pray judgment as in their amended petition.

(Signed) M. L. CLARDY,
RANEY & CARTY,
DICKSON & SMITH,
Attorneys for Plaintiffs.

(Record, page 31.)

Trial.

And thereafter, to wit, on the 26th day of September, 1892, said cause, by consent of both parties, came on for hearing before the Honorable J. F. Green, judge of the circuit court of Wayne county, a jury having been waived by both parties.

Plaintiffs suggested the death of Willard D. Brewer, one of the plaintiffs, and which suggestion was entered of record.

(Record, page 39.)

On the 6th day of February, 1893, first day of February —, the following judgment was rendered in this cause, to wit:

Judgment.

In the Circuit Court of Wayne County, February Term, A. D. 1893.

CALVIN F. COLLINS and FRANK C. BREWER, Surviving Partners of C. F. Collins & Company, Plaintiffs,
vs.
THE WAYNE LUMBER COMPANY, Defendant.

FEBRUARY 6TH, 1893.

Now, again, come the parties above named, by their respective attorneys, and this cause having been heretofore fully heard and by the court taken under advisement on the 26th day of September, 1892, and D. J. Allen, one of the sureties on the delivery bond given by the defendant herein, having since the submission of said cause departed this life, and the death of said D. J. Allen having been suggested, and Elizabeth Allen, executrix of the estate of the said D. J. Allen, having entered her appearance herein, and the court, being now fully advised of and concerning the premises, does order and adjudge that the said Elizabeth Allen, executrix, be, and she is hereby, substituted in the place and stead of the said D. J. Allen, deceased, without prejudice to any of the proceedings already had in this cause. The court finds and adjudges that the following-described property (less seventy-one and odd thousand feet thereof), seized by the sheriff in pursuance of proceedings in the above-entitled cause and being a portion of the property described in the petition, amended petition and affidavit in said cause, to wit:

Sheriff's No.	Marks found on piles.	Sizes of lumber in piles.
1....	No. 46, C. & Co.	1 x 4.
2....	24, " 2-9-91	1 x 4.
3....	141, " 6-1-91	1 x 12.
4....	127, " 6-1-91	2 x 4.
5....	139, " 6-1-91	1 x 6.
6....	138, " 6-1-91	1 x 4.
7....	135, " 6-1-91	1 x 4.
8....	136, " 6-1-91	1 x 10.
9....	29, " 2-9-91	1 x 6.
10....	30, " 5-1-91	2 x 6.
11....	31, " 2-9-91	2 x 6.
12....	135, " 6-1-91	1 x 6.
13....	No. 32, C. & Co., 2-9-91	2 x 8.
14....	134, " 6-1-91	2 x 4.
15....	33, " 2-9-91	2 x 12.
16....	133, " 6-1-91	2 x 10.
17....	34, " 2-9-91	1 x 4.
18....	128, " 6- -91	1 x 4.
19....	132, " 6-1-91	1 x 4.
20....	131, " 6-1-91	1 x 12.
21....	19, " 5-1-91	2 x 4.
22....	93, " 6-1-91	2 x 12.
23....	80, " 5-1-91	1 x 4.
24...	130, " 6-1-91	1 x 4.
25.. .	92, " 6-1-91	1 x 10.
26....	42, " 5-1-91	1 x 8, 10 & 12.
27....	129, " 6-1-91	1 x 4.
28....	84, " 5-1-91	1 x 8 & 10.
29....	71, " 5-1-91	1 x 4.
30....	91, " 5-1-91	1 x 4.
31....	85, 5-1-91	1 x 4.
32....	90, " 5-1-91	2 x 12.
33....	No marks so far as I could see, owing to	1 x 4.
34....	being piled in so closely to another pile. This applies to all noted as—	1 x 8 & 10.
35....	No mark	1 x 8.
36....	"	1 x 6.
37....	"	2 x 4.
38...	"	1 x 4.
39....	No mark	1 x 4.
40....	"	2 x 4.
41....	"	2 x 6.
42....	"	2 x 6.
43....	"	1 x 12.
44....	"	2 x 4.
45....	"	1 x 12.
46....	"	1 x 6.
47....	"	1 x 4.
48....	"	1 x 4.

Sheriff's No.	Marks found on piles.	Sizes of lumber in piles.
49....	No mark	1 x 4.
50....	"	1 x 4.
51....	"	1 x 10.
52....	"	"
53....	"	1 x 4.
54....	"	1 x 4.
55....	"	1 x 6.
56....	"	2 x 4.
57....	"	2 x 6.
58....	"	1 x 4.
59....	"	1 x 12.
60....	"	2 x 12.
61....	"	1 x 4.
62....	"	1 x 10.
63....	"	1 x 4.
64....	"	1 x 4.
65....	No. 42, C. & Co., 2-9-91.....	1 x 4.
66....	55, "	2 x 12.
67....	54, " 2-9-91.....	2 x 4.
68....	104, "	2 x 6.
69....	53, " 2-9-91.....	2 x 10.
70....	105, " 5-1-91.....	1 x 12.
71....	146, " 6-1-91.....	2 x 4.
72....	106, " 5-1-91.....	1 x 8-10 x 12.
73....	145, " 6-1-91.....	2 x 4.
74....	114, " 5-1-91.....	4 x 4.
75....	113, " 5-1-91.....	4 x 6.
76....	111, " 5-1-91.....	1 x 12.
77....	49, " 2-1-91.....	1 x 4.
78....	No mark	1 x 12.
79....	"	2 x 4.
80....	"	2 x 4.
81....	"	2 x 4.
82....	61, C. & Co.....	1 x 4.
83....	58, "	1 x 4.
84....	63, "	1 x 6.
85....	57, "	1 x 4.
86....	56, "	1 x 4.
87....	97, " 5-1-91.....	2 x 10.
88....	143, " 6-1-91.....	2 x 4.
89....	102, " 5-1-91.....	2 x 10.
90....	144, " 6-1-91.....	2 x 12.
91....	44, " 2-9-91.....	2 x 4.
92....	37, C. & Co., 2-9-91.....	2 x 10.
93....	No mark	2 x 10.
94....	"	2 x 4.
95....	21½, C. & Co., 5-1-91.....	1 x 8.
96....	20, " 2-1-91.....	1 x 10.

Sheriff's No.	Marks found on piles.	Sizes of lumber in piles.
97....	19, C. & Co., 2-9-91.....	1 x 8.
98....	12, " 2-9-91.....	1 x 6.
99....	18, " 2-9-91.....	1 x 12.
100....	11, " 2-9-91	1 x 4.
101....	17, " 2-9-91.....	1 x 12.
102....	No mark	1 x 12.
103....	"	1 x 12.
104....	"	1 x 8.
105....	"	1 x 10.
106....	"	1 x 10.
107....	No. 13, C. & Co, 2-9-91....	1 x 6.
108....	122, " 5-1-91.....	1 x 4.
109...	123, " 5-1-91.....	1 x 4.
110....	121, " 5-1-91.....	1 x 4.
111....	67, "	1 x 4.
112....	69, "	1 x 4.
113 ...	124, " 5-1-91.....	1 x 4.

is now in the possession of said defendants, and that the firm of C. F. Collins & Company, composed of C. F. Collins, W. D. Brewer, and F. C. Brewer, were, at the time of the institution of the proceedings herein, the owners of and lawfully entitled to the possession of said property, and that plaintiffs, as surviving partners of said firm, are entitled to the possession of said property. The court further finds and adjudges that the value of the property aforesaid is the sum of nineteen thousand three hundred and sixty dollars, and that the damages to which plaintiffs are entitled by reason of the detention of the same is the sum of one dollar. And thereupon, in open court, the plaintiffs elect to take judgment for the value of said property as found by the court.

It is therefore now considered by the court that the plaintiffs have and recover of the defendant and sureties on delivery bond by it given, namely, Douglas M. Storrs, George A. Withers, H. C. Withers, Elizabeth Allem, executrix of the estate of D. J. Allen, deceased, and John M. Bryden, the property aforesaid or the sum of nineteen thousand three hundred and sixty dollars, the value thereof so as aforesaid assessed by the court at the election of said plaintiffs, and also the said sum of one dollar, damages so as aforesaid by the court assessed, and costs of this suit, and have execution therefor; and it is further ordered that said judgment as to the estate of D. J. Allen be certified to the probate court of Wayne county for classification among demands allowed against said estate.

* * * * * * *

(Record, page 47.)

Motion for New Trial.

On 8th of February, 1893, and third day of February term, 1893, the following motion for a new trial was filed in this cause, to wit:

STATE OF MISSOURI, } ss:
County of Wayne, }

In the Circuit Court, February Term, 1893.

C. F. COLLINS & Co. }
vs. } Motion for New Trial.
WAYNE LUMBER CO. }

Now comes the defendant and moves the court to set aside its finding and judgment in this cause and to grant a new trial herein, and as grounds therefor states the following:

First.

* * * * * * *

Sixth.

Because the finding and judgment of the court is excessive and oppressive and is far in excess of the amount claimed by plaintiffs in their printed argument upon defendant's demurrer to the evidence and furnished to the court in its vacation, to wit, $6,000.00 in excess of the sum plaintiffs asked for.

Seventh.

Because the sheriff's return herein discloses the fact, and the fact is true, that plaintiffs took and carried away six car-loads of lumber, amounting to 71,222 feet, and there is no evidence to show the value of the same or its kind or dimensions.

* * * * * * *

(Record, page 59.)

Order Overruling Motion for New Trial.

On the 9th day of February, 1893, and fourth day of February term, 1893, the following entry of record appears in this cause, to wit:

C. F. COLLINS & Co. }
vs. } Replevin.
WAYNE LUMBER CO. }

Now, at this time, again come the parties in this cause by their respective att'ys, and the motion heretofore filed for a new trial in this cause is taken up, considered, argued, and upon the hearing of said motion the plaintiffs agree to strike from the judgment entered in this cause five thousand nine hundred and sixty dollars, upon which the said motion is by the court overruled; to which ruling and decision of the court the defendant objected and at the time excepted.

* * * * * * *

(Record, page 146.)

Plaintiff's counsel then called F. C. BREWER, who, being duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. Please state your full name.
A. Frank C. Brewer.
Q. Your residence.
A. St. Louis.
Q. And your business.
A. Wholesale lumber.
Q. Were you a member of the firm of C. F. Collins & Co.?
A. Yes, sir.
Q. And are you one of the surviving partners of that firm?
A. I am.
Q. Mr. Brewer, how long have you been engaged in buying and selling lumber in the Western market, particularly in Missouri?
A. About nine years.
Q. And you have had some little experience in connection with the buying and selling of lumber, particularly yellow-pine lumber?
A. Well, I should judge, as much as anybody.
Q. Do you consider yourself competent to testify as to lumber values during that period—do you or do you not consider yourself competent?
The COURT: I think he has sufficiently qualified already.

Mr. SMITH:

Q. Mr. Brewer, where was the principal market of the firm of Collins & Co. during 1891 for the yellow-pine lumber that they might purchase of the character of that in controversy?
A. In Missouri and Illinois.

Objected to, as the witness has not proven that he is acquainted with the character of the lumber in controversy.

The COURT: Do you know the character of the lumber in controversy?
A. I do.

Mr. SMITH:

Q. Go on, as you know what Missouri yellow-pine lumber is, and tell us the principal markets of the Collins Lumber Co. of that character during 1891.
A. Probably the largest quantity of the stock would move in the State of Missouri; and then a good proportion of it went in the States of Illinois, Indiana, Ohio, and as far up north as Michigan.
Q. Do you sell west of Missouri?
A. Some little; yes, sir.
Q. Where, however, are the principal sales of the firm or where were they during 1891?

Objected to as immaterial.

The COURT: It will have to be admitted, though it is a little out of order.

To which ruling of the court in admitting said testimony the defendant at the time excepted.

A. Well, the entire product would be probably disposed of in Missouri, Indiana, and Illinois.

Q. State, if you know, how the prices for lumber of the kind and description in controversy, in Illinois and Indiana, compared with that of the same character of lumber in the States west of Missouri.

A. Well, taking the Missouri river west, the prices are considerably lower than they were in what we term the Eastern market.

Q. During 1891?

A. Yes, and that still holds good in the present market.

Q. Mr. Brewer, are you familiar with the prices—the values, rather—of lumber today in the Missouri market, we will say at Clearwater, of lumber such as in controversy?

A. Yes, sir.

Q. Have you examined the return of the sheriff with a view to fixing the value of the lumber that was taken b- him?

A. I have.

Q. Are you able, as a lumberman, to give the court the values today of the different kinds of lumber therein set forth?

A. Yes, sir.

Objected to, as it is not the value of today, but the value at the time the lumber was taken, that is in question.

The COURT: The value on the day of trial.

To which ruling of the court in admitting said testimony the defendant at the time excepted.

Q. Mr. Brewer, have you put in such shape as to show the fair reasonable market value today of the lumber seized by the sheriff in this case?

A. Yes, sir; I have. I can get it for you, Mr. Smith.

Q. Please do so.

(Witness produces paper.)

Q. Have you been able from the sheriff's return to identify the lumber that in his return is not as bearing marks, or marks other than the ones that he placed upon it himself?

A. Very reasonably so; yes, sir.

Objected to as incompotent, irrelevant, and immaterial. Objection overruled; to which ruling of the court the defendant at the time excepted.

Q. Mr. Brewer, can you give the court—and if so, will you—the fair reasonable market values today of the piles of lumber returned in the sheriff's return?

Objected to, as it is not proven that witness knows what lumber is returned in the sheriff's return. Objection overruled; to which ruling of the court the defendant at the time excepted.

Q. Mr. Brewer, have you prepared any written statement that will show the present market values that I have questioned you about with respect to the lumber mentioned in the sheriff's return?

A. I have.

The COURT: According to the piles?

A. I have.

Mr. SMITH: Will you explain, so that the court in examining your statement will understand it, how you have made that statement up?

A. The statement is descriptive of the values of lumber and the kind of lumber in the piles. From the kind of lumber, I arrived at the market value on cars at Clearwater by deducting from our present prices in the present market the amount of freight necessary to carry it to such a market.

Q. Is there any general lumber market at Clearwater? I mean by that a general lumber market where prices are fixed.

A. I shouldn't consider so; no, sir.

Q. Is there such a market at St. Louis?

A. Yes, sir.

Q. Now, how have you shown the Clearwater value in that statement?

A. By subtracting from the price——

Q. No; how have you written them down there, in giving the description of the lumber and what kind and what it is worth per thousand on cars at the mill? What are the figures at the end, in red?

A. That is the total amount in dollars and cents that each pile of lumber is worth.

Q. So that the court by referring to the statement can determine the particular pile that you testify about, and also the values that you place upon that pile today?

A. Yes, sir.

Q. And what is the aggregate of the market value today of all the piles of lumber embraced in that statement?

A. I would like to make that a little different. This embraces all the piles in the statement; there were some I couldn't identify, and all the sheriff identifies; others I could identify from our last bill of sale; it amounts to $25,616.36.

Q. There was some you couldn't identify?

A. Yes, sir.

Q. Hence you couldn't place values upon them today?

A. I put no values on those piles.

Q. That statement which you have prepared for the court will show, will it, the piles of lumber you were not able to identify?

A. Yes, sir.

Q. And I assume that against them no figures have been placed?

A. None at all, sir.

Q. Please hand that statement to the clerk for the use of the court, and state, if you please, whether or not you have made it up in such a way as to know that it is accurate.

A. Yes, sir; I certainly did.

(Clerk will here insert statement.)

Which said statement is in words and figures following:

Sheriff No.	Marks found on piles.			Sizes of lumber in piles.
1	#46, C. & Co.	21,216 ft. com. r'gh, 4″ 16′, @ $9.50	5-1-91	(201 55)* 1 x 4
2	24, "	3,373 " " " " 10, @ $9.00	2-9-91	(30 35)* 1 x 4
3	141, "	31,872 " " " 12″ 16, @ $11.00	6-1-91	(350 59)* 1 x 12
4	127, "	18,720 " " " 4–20, @ 10.50	6-1-91	(196 56)* 2 x 4
5	139, "	3,000 " " " 6″, @ 9.50	6-1-91	(28 50)* 1 x 6
6	138, "	12,000 " " " 4″, @ 9.50	6-1-91	(114 00)* 1 x 4
7	135, "	38,000 " star & better, 6″, @ 14.00	6-1-91	(532 00)* 1 x 4
8	136, "	3,590 " com. r'gh, 10″ 16, @ 10.50	6-1-91	(37 69)* 1 x 10
9	29, "	13,280 " " " 6″ 16, @ 10.00	2-9-91	(132 80)* 1 x 6
10	30, "	47,936 " " " 2 x 6–16, @ 9.50	5-1-91	(455 39)* 2 x 6
11	31, "	10,080 " " " 18, @ 10.50	2-9-91	(105 84)* 2 x 6
12	135, "	as above (38,000)* ft. [star & better, 4″]† [15,000]†	@ (14.00)* 6-1-91	(532 00)* 1 x 6
13	32, "	30,492 " com. r'gh, 2 x 6–16, @ 9.50	2-9-91	(289 67)* 2 x 8
14	134, "	45,232 " " " 2 x 4–16, @ 9.50	6-1-91	(429 71)* 2 x 4
15	33, "	60,416 " " " 2 x 12–16, @ 10.00	2-9-91	(604 16)* 2 x 12
16	133, "	8,748 " " " 2 x 10–16, @ 10.00	6-1-91	(87 48)* 2 x 10
17	34, "	37,333 " star & better, 4″ 16, @ 14.00	2-9-91	(522 66)* 1 x 4
18	128, "	38,016 " " " 4″, @ 14.00	6-91	(532 22)* 1 x 4
19	132, "	38,000 " " " " @ 14.00	6-1-91	(532)* 1 x 4
20	131, "	57,392 " com. r'gh, 12″ 16, @ 11.00	6-1-91	(631 31)* 1 x 12
21	19, "	60,000 " " " 8″ 16, @ 10.00	5-1-91	(600)* 2 x 4[2]†
22	93, "	60,800 " " " 2 x 12–16, @ 10.00	6-1-91	(608)* 2 x 12
23	80, "	34,000 " " " 6 " @ 9.50	5-1-91	(323)* 1 x 6
24	130, "	28,597 " " " 4″ 16, @ 9.50	6-1-91	(271 68)* 1 x 4
25	92, "	50,667 " " " 10″ 16, @ 10.50	6-1-91	(532 00)* 1 x 10
26	*(1)42 "	4	5-1-91	1 x 8—10 & 12
27	129, "	40,533 " star & better, 4″–16, @ 14.00	6-1-91	(p 67 46)* 1 x 4
28	84, "	7,200 " " " 8″ to 12, @ 15.00	5-1-91	(108)* 1 x 8 & 10
29	*(1)71 "		5-1-91	1 x 4

[* Figures enclosed in parentheses in red ink in copy.]
[† Words and figures enclosed in brackets erased in copy.]

Sheriff No.	Marks found on piles.		Sizes of lumber in piles.
30	91, "	52,661 " star & better, 4"-16, @ 14.00. 5-1-91 ..	(737 25)* 1 x 4
31	85, "	20,491 " " " " " @ 14.00. 5-1-91 ..	(286 87)* 1 x 4
32	90, "	26,624 " com. r'gh, 2 x 12-16, 10.00 ... 5-1-91 ..	(266 24)* 2 x 12
			(10,646 98)*
			(10,646 98)*
33	(#9)*	45,000 ft. star & better, 1 x 4, all @ 14.00.	(630 00)*
	No marks, as far as I could see, owing to being piled so closely to another pile. This applies to all piles noted as no mark.		1 x 4
34	(#14)*	12,000 ft. com. r'gh, 1 x 8 to 12" 14, @ 10.50	1 x 8 & 10
35	(#83)*	8,910 " star & better, 1 x 8-16 " @ 15.00.....	(126)* 1 x 8
36	(#8)*	10,000 " " " 1 x 6, all " " @ 14.00.....	(133 65)* 1 x 6
37	(#23)*	18,117 " com. r'gh, 2 x 4 14 " @ 9.50.....	(172 12 * 2 x 4
38	(#47)*	9,707 " " " 1 x 4 14 " @ 9.00.	(87 37)* 1 x 4
39	(#64)*	9,600 " " " 1 x 4 12 " @ 9.00.....	(86 40)* 1 x 4
40	(#25½)*	15,312 " " " 2 x 4 - 12 " @ 9.50.....	(145 47)* 2 x 4
41	(#66)*	9,180 " " " 2 x 6 - 18 " @ 10.50.....	(96 39)* 2 x 6
42	(#39)*	7,308 " " " 2 x 6 - 12 " @ 9.50.....	(69 43)* 2 x 6
43	(#6)*	7,000 " star & better, 1 x 12, all " @ 15.00	(105)* 1 x 12
44	(#38)*	52,360 " com. r'gh, 2 x 4 - 16 " @ 9.50.....	(549 78)* 2 x 4
45	(#107)*	5,000 " " " 1 x 12 - 20 " @ 11.00	(55 00)* 1 x 12
46	(#7)*	6,000 " star & better, 1 x 6, all " @ 14.00.....	(84 00)* 1 x 6
47	(#68)*	13,904 " com. r'gh, 1 x 4 - 16 " @ 9.50.....	(132 09)* 1 x 4

[*Figures enclosed in parentheses in red ink in copy.]

Sheriff No.	Marks found on piles.			Sizes of lumber in piles.
48	(#74)*	15,051	ft. com. r'gh, 1 x 4 - 16 " @ 9.50.....	1 x 4 (355 79)*
49	(#75)*	14,560	" " " " " " "	1 x 4
50	(#76)*	7,840	" " " " " " "	1 x 4
51	(#15½)*	8,000	ft. star & better, 1 x 10 to 16 " all @ 15.00.....	(120)* 1 x 10
52	(#89)*	6,630	" " " 1 x 10 - 16 " @ 15.00.....	(99 45)* 1 x 10
53	(#86)*	5,000	" com. r'gh, 1 x 4-12-14 " " 9.00.....	(45 00)* 1 x 4
54	(#125)*	15,000	" star & better " 12 to 16 " " 14.00.....	(210 00)* 1 x 4
55	(#16½)*	4,000	" " " 1 x 6 14 " " 14.00.....	(56)* 1 x 6
56	(#45)*	25,696	" com. r'gh, 2 x 4-16 " " 9.50.....	(244 12)* 2 x 4
57	(#28)*	5,600	" " " 2 x 6-20 " " 10.50.....	(58 80)* 2 x 6
58	(#137)*	56,000	" star & better, 1x4-12 to 16 " " 14.00.....	(784)* 1 x 4
59	(#82)*	14,000	" " " 1 x 12 " " " 15.00.....	(210)* 1 x 12
60	(#26)*	40,000	" com. r'gh, 2 x 12-24 " " 12.00.....	(480)* 2 x 12
61	(#10)*	15,500	star & better, 1 x 4 6, all " " 14.00.....	(217)* 1 x 4
62	(#109)*	25,000	com. r'gh, 1 x 10-20 " " 10.00.....	(262 50)* 1 x 10
63	.....	.....	..... "	1 x 4
64	.....	.....	..... "	1 x 4
				(16,262 34)*
				(16,262 34)*
65	#42.....		C. & Co. 2-9-91 ..	1 x 4
66	55.....	19,968	ft. com. r'gh, " 2 x 12, @ 10.00 ..	(199 68 * 2 x 12
67	54	8,932	" " " " 2 x 4-10, @ 10.50.. 2-9-91 ..	(93 78)* 2 x 4
68	104.....	9,016	" " " " 2 x 6-14, @ 9.50...	(85 65)* 2 x 6

[*Figures enclosed in parentheses in red ink in copy.]

Sheriff No.	Marks found on piles.			Sizes of lumber in piles.
69	53	27,216 " " " "	2 x 10-16, @ 10.00. 2-9-91 ..	(272 16)* 2 x 10
70	105	56,576 " " " "	1 x 12-16, @ 11.00. 5-1-91 ..	(622 33)* 1 x 12
71	146	36,135 " " " "	2 x 4-16, @ 9.50.. 6-1-91 ..	(343 29)* 2 x 4
72	106	19,000 " " " "	1 x 8 to 12" 12, @ 10.50..... 5-1-91 ..	(199 50)* 1 x 8-10 & 12
73	145	50,864 " " " "	2 x 4-16, @ 9.50.. 6-1-91 ..	(483 21)* 2 x 4
74	114	15,000 " " " "	4 x 4-12 to 18, @ 9.00..... 5-1-91 ..	(135)* 4 x 4
75	113	16,000 " " " "	4 x 6 " @ 9.00..... 5-1-91 ..	(144)* 4 x 6
76	111	14,256 " " " "	1 x 12-18, @ 10.50. 5-1-91 ..	(149 68)* 1 x 12
77	49	15,479 " " " "	1 x 4-14, @ 9.00.. 2-9-95 ..	(139 31)* 1 x 4
				(19,129 93)*
78	No mark			1 x 12
79	"			2 x 4
80	"			2 x 4
81	"			2 x 4
82	61, C. & Co.	13,140 ft. com. r'gh, 1 x 4-16, @ 9.50		(124 83)* 1 x 4
83	58, "	10,500 " " " "	14, " 9.00	(94 50)* 1 x 4
84	63, "	9,240 " " "	1 x 6-14, " 9.50	(87 78)* 1 x 6
85	57, "	11,104 " " "	1 x 4-12, " 9.00	(99 94)* 1 x 4
86	56, "	7,533 " " " "	10, " 10.00	(67 80)* 1 x 4
87	97, "	4,608 " " "	2 x 10-12, @ 10.00..	(160 00)*
		16,000 " " "	5-1-91 " ..	2 x 10
88	143, "	61,047 " " "	2 x 4-18, 10.50..... 2 x 10-16, 10.00..... 6-1-91 ..	(48 38)* 2 x 4
89	102, "		" " ..	(610 47)*
			5-1-91 ..	2 x 10
90	144, "	20,480 " " "	2 x 12-16 " 10.00 .. 6-1-91 ..	(327 68)* 2 x 12
91	44, "	52,620 " " "	2 x 4-18 " 10.50 .. 2-1-91 ..	(330 48) 2 x 4
92	37, "	33,048 " " "	2 x 10-16 " 10.00 .. 2-9-91 ..	2 x 10
93	No mark			2 x 10
94	"			(504 00)* 2 x 4

[*Figures enclosed in parentheses in red ink in copy.]

Sheriff No.	Marks found on piles.		Sizes of lumber in piles.
95	21½, C. & Co.	48,000 " com. r'gh, 1 x 10-16, @ 10.50. 5-1-91 ..	1 x 8
96	20, "	62,000 " " " 1 x 10-16, @ 10.50 . 2-9-91 ..	(651 00)* 1 x 10
			(22,236 79)*
			(22,236 79)*
97	#19	60,000 ft. com. r'gh, C. & Co., 1 x 8-16, @ 10.00 ..... 2-9-91 ..	(600 00)* 1 x 8
98	12	19,000 " star & better, C. & Co., 1 x 6, all, @ 14.00.... 2-9-91 ..	(266 00) 1 x 6
99	18	75,000 " com. r'gh, C. & Co., 1 x 12-16, @ 10.00 ..... 2-9-91 ..	(825 00)* 1 x 12
100	11	15,000 " star & better, C. & Co., 1 x 4, all, @ 14.00.... 2-9-91 ..	(210 00) 1 x 4
101	17	50,000 " com. r'gh, C. & Co., 1 x 12-16, @ 11.00 ..... 2-9-91 ..	(550 00) 1 x 12
102	No mark		1 x 12
103	"		1 x 12
104	"		1 x 8
105	"		1 x 10
106	"		1 x 10
107	#13	16,250 ft. star & better, C. & Co., 1 x 6, all, @ 14.00.... 2-9-91 ..	1 x 10
108	122	10,000 " " " C. & Co., 1 x 4-12 to 16, @ 14.00 ..... 5-1-91 ..	(577 50)* 1 x 4
109	123	6,000 " " " C. & Co., 1 x 4-12 to 16, @ 14.00 ..... 5-1-91 ..	1 x 4
110	121	9,000 41,250 " " " C. & Co., 1 x 4-12 to 16, @ 14.00 ..... 5-1-91 ..	1 x 4
111	67	22,123 " com. r'gh, C. & Co., 1 x 4-16, @ 9.50	(210 17)* 1 x 4
112	69	5,808 " " " C. & Co., 1 x 4-16, @ 9.50	(55 18)* 1 x 4
113	124	9,500 " star & better, C. & Co., 1 x 4-12 to 16, @ 14.00. 5-1-91 ..	(133)* 1 x 4
			($25,663 64)*

[*Figures enclosed in parentheses in red ink in copy.]

* * * * * * *

(Record, page 171.)

At this point the plaintiffs rested their case.

Thereupon defendant's counsel asked the following instruction:

"The court declares the law to be that upon the pleadings and the evidence plaintiff is not entitled to recover."

Which instruction was by the court refused; to which action of the court in refusing to give such instruction the defendant at the time objected and excepted.

Thereupon defendant called as a witness Harry Withers, who being duly sworn, testified as follows:

"Q. (By Mr. YANCEY:) State your name, age, residence, and occupation. A. My name is Harry C. Withers. I reside at Clearwater, Wayne county, Missouri. I am treasurer of the Wayne Lumber Company."

After the hearing of the foregoing testimony of witness Harry Withers, Mr. Yancey, of counsel for defendants, stated to the court that defendant would enter a dismissal as to the two counter-claims set up in defendant's answer, and that defendant would insist upon the demurrer to the testimony offered by *them*.

Whereupon the witness Withers was withdrawn from the stand.

Mr. Yancey, of counsel for defendants, thereupon stated to the court that he desired to go to his office to procure some authorities, and desired to argue the case as made.

Whereupon the court remarked to counsel that if no further testimony was offered, and that counsel intended to insist upon the demurrer to the testimony, the court would withhold its rulings upon the demurrer to the testimony and pass upon the demurrer in passing upon the whole case.

Thereupon the case was argued by counsel for defendant and counsel for the plaintiff.

* * * * * * *

(Record, page 195.)

And afterwards, to wit, on the 21st day of May, 1895, the further following proceedings were had in said cause, viz:

CALVIN F. COLLINS and FRANK C. BREWER, Surviving Partners of C. F. Collins and Company, Respondents, *vs.* THE WAYNE LUMBER COMPANY, Appellant.	Appeal from Wayne County Circuit Court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid by the said Wayne county circuit court rendered, be in all things affirmed and stand

in full force and effect, and that the said respondents recover against the said appellant their costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, viz:

In the Supreme Court of Missouri, Division No. 2, April Term, 1895.

C. F. COLLINS *et al.*, Respondents,
vs.
WAYNE LUMBER COMPANY, Appellant.

This is an action of replevin commenced by Calvin F. Collins, W. D. Brewer, and Frank C. Brewer, dealers in lumber under the name of C. F. Collins & Co., against The Wayne Lumber Company, a corporation engaged in manufacturing lumber at Clearwater, in Wayne county, Missouri.

The petition, affidavit, and bond for the replevin are in the usual form, describing 2,686,492 feet of yellow-pine lumber by the number of pieces of each size and dimensions in 146 piles of lumber, marked "C. & Co.," in the mill yards of the defendant at Clearwater.

An order of delivery was duly issued and the sheriff made his return thereto, certifying that he had seized 113 stacks of lumber and delivered six car-loads, amounting to 71,222 feet, to the plaintiffs and returned the remainder to the defendant upon its giving a delivery bond, which bond he returned into court. The answer was, first, a general denial; second, that on Feb. 15, May 5th, and June 3rd, 1891, plaintiffs "by covin and deceit" had obtained from defendant bills of sales, embracing a large amount of lumber *then manufactured* and in stock at defendant's yards at Clearwater, purporting to be conveyances and delivery of the lumber therein described, when in truth and in fact said bills of sale were understood and intended to be only an equitable lien to secure the sum of $5.00 per thousand feet advanced on said lumber by plaintiffs under a contract of November 7th, 1890, until said lumber should be shipped out on the orders of plaintiffs, when plaintiffs should pay the balance due to defendant on the 5th day of each month for the previous shipments; that plaintiffs had not complied with their contract by refusing to advance money at the rate of $5.00 per thousand feet for the lumber cut under said contract, and were now fraudulently asserting title under said bills of sale; third, defendant averred it was the sole and absolute owner of said lumber, asked for its return, and prayed damages for its detention.

Defendant also set up two counter-claims, one for its loss on seven *missions* of feet of lumber by it cut and stacked, as by its contract of Nov. 7, 1890, it had agreed, which plaintiffs had refused to order and advance the $5.00 per thousand feet, and the second was for $90 for one car-load of lumber shipped to plaintiffs in June, 1891.

The replication was a general denial. At the trial defendant dismissed its two counter-claims.

Both parties waived a jury and the cause was tried to the court. W. D. Brewer, one of the plaintiffs, having died since the commence-

ment of the action, his death was duly suggested and the petition was amended and the action continued in the name of C. F. Collins and F. C. Brewer as surviving partners. Defendants refiled its original answer.

The controversy originated in a contract entered into between the parties on Nov. 7, 1890, which is in these words:

"CLEARWATER, Mo., *Nov. 7th*, 1890.

This agreement made and entered into this seventh (7th) day of November 1890 between the Wayne Lumber Company and C. F. Collins & Co. to wit:

The Wayne Lbr. Co. agree to sell the cut of their mill at Clearwater, Mo., for the year 1891, loading same on cars as ordered and at prices as shown by list on reversed side of this sheet.

That they will furnish stock sheet the first of each month showing stocks on hand.

The goods to be well manufactured and to standard grades—and shipments to have proper attention and the filling of orders to best advantages and with as little delay as possible.

The stock to be cut as nearly to saw-bill as furnished by Collins & Co. as practicable.

Payments to be in cash on the 5th of each month for the previous month's shipments.

Provided—C. F. Collins & Co. agree to advance five ($5.00) dollars per M on such part as the Wayne Lbr. Co. may want on the stock on hand [up to April 1st 1891]* at any time the Wayne Lbr. Co. agreeing to give [mortgage]* bill of sale on all stock in stack at the time advance is made to have same insured and assigned and pay 3½ per cent. per annum on such money advanced—[for all lumber added to the amount on hand on April 1st 1891 Collins & Co. shall advance five ($5.00) doll's per M on such added stock without interest the stock so added to be covered by mortgage and insurance as above provided for].* [bill of sale]*

Any badly mixed special house or barn bills carrying a large number of items shall be charged at 50c. per M.

WAYNE LUMBER CO.,
Per D. M. STORRS."

And on the reverse side of said contract are the following words and figures:

[* Words and figures enclosed in brackets erased in copy.]

YELLOW-PINE LUMBER.

Price-list of C. F. Collins & Co., Wholesale Dealers, Room 522 Keith & Perry Building, Kansas City, Mo.

We have a well-assorted stock and can ship promptly.

	1st & 2d, clear.	Star.	Common.
7/8" or flooring.			
13/16 x 4-inch	16 00	14 00	10 00
13/16 x 6-inch	16 00	14 00	10 00
13/16 x 4 or 6 inch	17 50	15 50	11 50
[For straight grain add $6.50 per M.]*			
Ceiling.			
[3/8 x 4 or 6 inch]*			
1/2 x 4 or 6 inch	13 50	12 00	8 00
5/8 x 4 or 6 inch	14 50	13 00	8 00
3/4 x 4 or 6 inch	16 00	14 00	9 00
Partition and corrugated ceiling, $2.00 more than regular ceiling, same thickness and grade.			
Drop siding, $1.00 more than flooring.			
Siding (bevel).			
From 1-inch stock	10 50	9 00	7 50
Finishing, S. 2 S.			
1 x 4 and 6 inch	16 00	14 00	10 00
8, 10, and 12 inch	17 00	14 00	10 00
1 1/4 x 6, 8, 10, and 12 inch	18 00	14 00	10 00
1 1/2 x 6, 8, 10, and 12 inch	18 00	14 00	10 00
2 x 6 to 2 x 12 inch	18 00	14 00	10 00
For wider than 12-inch add $2.00 per M.			
Moulded casing and base.			
From 3, 4, 5, & 6 in. stock, B. M.	Rough	finish, $1.00	per M less.
From 8, 10, & 12 in. stock, B. M.			
7/8 x 4 and 6 S. 4 S., plain, B. M.			
Mouldings per Universal moulding book, 50 per cent. discount.			

We have several mills in our combination. Send your orders direct to this office, that we may place them where they can be shipped promptly.

Correspondence solicited. Communications answered promptly.

Common boards, S. 1 S.

1 x 8, 12 to 20 feet, r'gh	8 50	S. 1 S.	9 25
1 x 10, 12 to 20 feet, "	8 50	"	9 25
1 x 12, 12 to 20 feet, "	9 50 to 20		10 25

Shiplap or D. and M. boards add 50 cents per M.

Fencing, S. 1 S.

1 x 6, 16 feet, 1 x 6, other lengths, 1 x 4, 16 feet, 1 x 4, other lengths	R'gh	8 50
	S. 1 S.	9 25

Rough and Per M.

Dimension, S. 1 S. and 1 E.

10 to 20 ft.

2 x 4, 2 x 6, and 2 x 8	[12 to 16 ft.	10, 18, and 20 ft.]*	22 and 24 ft.
	R'gh	8 50	9 25
2 x 10 and 2 x 12 3-12	S. 1 S. 1 E.	9 25	10 00
2 x 14 and [3 x 12],* r'gh	9 25	S. 1 S. 1 E.	10 00
4 x 4 and 4 x 6	R'gh		8 50
6 x 6 to 8 x 8, r'gh			
8 x 10 to 12 x 12, "	S. 4 S.		2 00

For 16-in. joists add $2 per M to 2 x 14.
Add for lengths over 24 ft. $1.00 for every 2 ft. additional.

Lath.

[3/8 x 1 1/2 in., 4 feet, plastering lath]*.
[5/8 x 1 1/2 in., 4 feet, wire-fence lath]*.

[Cypress shingles]*

[Dimensions, A. 5 and b	Will quote.]*
Ex. *A*	Special.]*
[*A*	On inquiry.]*

[Terms.—60 days, or 2 per cent. discount from net bills if paid within 10 days.]*

[Prices quoted are subject to market changes and changes in freight rates without notice.]*

We have the best cypress shingles in the market. No. 2, $2.00 less per M.

Kansas City, Mo.—Prices quoted in this list are delivered at your station. We are in line. Good goods and prompt shipments. Please put date and number of list on orders. Any stock cut specially for St. Louis market to be stacked 50c. per M extra. Any stock cut special[ly]* and to be kiln-dried, 50c. per M extra.

[* Words and figures enclosed in brackets erased in copy.]

Plaintiffs, to maintain their case, offered and read in evidence, over the objections of defendant, three several bills of sales. The first was as follows:

"CLEARWATER, MISSOURI, *Feb'y* 15, 1891.

"We have this day sold, marked, and delivered to C. F. Collins & Co., St. Louis, Mo., the following piles of lumber in our yard at Clearwater, Mo., as follows: (Here follows a minute description by size, dimensions, and number of pieces, the total aggregating 1,196,268 feet of lumber in 75 piles.) Said above-described lumber to be loaded according to their orders, more fully expressed in a certain contract between us and said C. F. Collins & Co., dated November 7th, 1890. On the above-mentioned sale we have received of said C. F. Collins & Co., this 15th day of February, 1891, five thousand dollars ($5,000), for which we are to pay them 3½ per cent. per annum for 6 mos. from date.

THE WAYNE L. CO.,
[L. S.] D. M. STORRS, *Presd't*,
GEO. A. WITHERS, *Sec'y*."

The second bill of sale was as follows:

"We have this day sold, marked, and delivered to C. F. Collins & Co., St. Louis, Mo., the following piles of lumber in our yard at Clearwater, Mo. (Here follows detailed account of lumber.) Total amount of feet in 115 piles, 1,792,911.

Said above-described lumber to be loaded according to their orders, more fully expressed in a certain contract between us and said C. F. Collins and Co., dated Nov. 7, 1890. On the above-mentioned sale we have received of said C. F. Collins & Co. $5,000 Feb'y 15, 1891, and $4,000 this 5th day of May, 1891, for which we are to pay them 3½ per ct. per annum from receipt till payment.

WAYNE L. CO.,
Per D. M. STORRS, *Pres.*

H. C. WITHERS, *Treas.*"

The third bill of sale was of date June 3, 1891, in the same form; the total amount of lumber described in it was 134 piles, containing 2,686,492 feet, in which the company recites that on the above-mentioned sale it had received of C. F. Collins & Co. $5,000 Feb'y 15, 1891; $4,000 May 5, 1891, and $4,400 June 3rd, 1891, and they are to pay 3½ per ct. on same per annum from receipt till paid.

Plaintiffs also offered evidence tending to prove that plaintiffs had ordered lumber of defendant, which it had failed to ship according to contract; that they had refused orders, claiming they had verbal understanding on different questions that came up; that Mr. Collins had said to Mr. H. C. Withers, the treasurer of the company, who was there, that before making further advance payments on lumber cut during the month of June he wished an understanding of those differences which he had claimed from time to time and which had been coming up every month; that we would all get together and talk it up; that he only knew the contract—that was

all he could go by; that he was ready and willing to make the payments by the contract, but he must have an understanding of the differences, and that they must be adjusted; that the only differences was 50 cents a thousand on lumber which he claimed more than the contract price; also that his copy of the contract was different from ours, and there were also orders sent him that had not been filled; that F. C. Brewer had gone in person to Clearwater and made demand on Mr. Storrs, the president, and Mr. Withers, the secretary and treasurer, of defendant, for the lumber described in their several bills of sale, and they refused to permit him to go near it; that the title to the lumber was in plaintiffs, and they only owed a balance over and above the $5.00 paid cash when they should get the lumber; that upon the refusal to deliver the lumber they commenced this action. At the close of plaintiffs' case defendant offered a demurrer to the evidence, which was by the court overruled.

Thereupon defendant called as a witness Harry C. Withers, who, being duly sworn, testified as follows:

"Q. State your name, age, residence, and occupation."

"A. My name is Harry C. Withers; I reside at Clearwater, Wayne county, Missouri; I am treasurer of the Wayne Lumber Company."

After the hearing of the foregoing testimony of witness Harry C. Withers, Mr. Yancey, of counsel for the defendant, stated to the court that defendant would enter a dismissal as to the two counter-claims set up in defendant's answer, and that defendant would insist upon the demurrer to the testimony offered; whereupon the witness Withers was withdrawn from the stand.

Mr. Yancy, of counsel for defendant, thereupon stated to the court "that he desired to go to his office to procure some authorities and desired to argue the case as made."

Whereupon the court remarked to counsel that if no further testimony was offered, and that counsel intended to insist upon the demurrer to the testimony, the court would withhold its ruling upon the demurrer to the testimony and pass upon the demurrer in passing upon the whole case."

Thereupon the case was argued by both sides, and at the conclusion the court took the case under advisement until the next term. On the first day of the next term counsel for defendant asked leave to offer evidence then or at such time as might suit the court; which request the court refused, stating at the time that in the opinion of the court the case had been finally submitted by both parties on the hearing in September, 1892; to which action defendant excepted at the time. The court thereupon announced its decision.

And the court, on the same day, immediately entered final judgment in favor of the plaintiffs and against the defendant, The Wayne Lumber Company, and Douglas M. Storrs, George A. Withers, H. C. Withers, Elizabeth Allen, executrix of the estate of D. J. Allen, deceased, and John M. Bryden, finding and fixing the value of the property in question at the sum of $19,360, and that the same, at

the institution of this suit, belonged to plaintiffs, and that they were entitled to the possession of the same, and rendering judgment for the return of said property or said sum of $19,360, at the option of the plaintiffs.

To which finding and judgment of the court the defendant then and there, at the time, objected and excepted.

On the motion for rehearing the court announced from the bench that if plaintiffs would remit $5,960 of said judgment he would overrule the motion; otherwise sustain it.

Plaintiffs thereupon entered a remittitur of $5,560, and the court overruled the motion. In due time an appeal was perfected to this court.

I.

The first, second, third, and ninth assignments are based upon the action of the court in refusing to reopen the case in February, 1893, and allow defendant to introduce evidence. The contention of counsel that injustice was done them in not reopening this case is somewhat remarkable. The cause had been set down specially for hearing, all parties were present, the plaintiff's case was all in, a demurrer to the evidence overruled, the defendant had begun its testimony, and one of its witnesses — partially examined; whereupon, without suggesting that defendant was unable to proceed for any cause, the record recites that counsel for defendant withdrew his witness and voluntarily dismissed his two counter-claims and advised the court that defendant would insist upon its demurrer to the testimony. No right to introduce evidence at a later day was asked or mentioned, but counsel stated he desired to argue the case as made; whereupon the court remarked to the counsel that if no further testimony was offered and if counsel intended to insist upon the demurrer the court would withhold its ruling upon the demurrer to the testimony and pass upon it with the whole case.

To claim now that under such a state of the record that counsel understood they were being accorded the right to argue the demurrer only, and if decided adversely to them they could then offer their evidence, is an unwarranted construction of the record before us.

There is no reasonable foundation for such a position. The record indicates as plainly as language can that notwithstanding the court had already overruled the demurrer, inasmuch as it then understood that all the evidence on both sides was in it would simply recall that and decide it along with the whole case, which was then submitted. We think the position assumed is without precedent and certainly has nothing to commend it, since not the slightest reason was assigned why the evidence was not offered at the time and place selected for hearing it, nor is there any intimation that anything new has been discovered or that defendant was surprised by anything offered by plaintiff in September. Moreover, defendant did not wait until the demurrer was overruled, but offered to introduce this evidence before the court passed upon it.

The trial court must dispose of their time and business with a

view to the public interest, and it must be an extreme case which will require interference with their discretion in that regard.

This court will not interfere with the discretion of the trial court in excluding evidence offered out of time. State *vs.* Smith, 80 Mo., 516; State *vs.* Richardson, 117 Mo., 586. The record disproves the charge that the court denied defendant the right to introduce its evidence.

II.

As the defendant withdrew its counter-claim for $90, and there was not a word of evidence offered to sustain it, the court manifestly committed no error in not crediting defendant with it in the replevin suit.

III.

There was likewise no evidence of the value of the 71,222 feet of lumber turned over by the sheriff to respondents. The claim now made that it was worth $1,750 is not supported by the proofs. There is no evidence either as to the dimensions or value of this lot of lumber. The history of the proof on this question is this: The witness Brewer presented the court with a schedule of prices showing what all the lumber seized by the sheriff was worth. This estimate included the 71,222 feet, and tended to prove the aggregate value of the lumber levied on was $25,663.64. The court, after making all allowances, at first rendered a judgment for plaintiff for $19,360. Subsequently on the motion for new trial the respondents, taking the view that under the decisions of this court they were entitled to recover in replevin to the extent of their actual interest, and, having elected to take a money judgment, consented to remit all exceeding their interest in the lumber. The evidence shows advances in cash to the amount of $13,000, exclusive of interest, which the evidence all shows defendant agreed to pay, and it must be presumed the court took these items into consideration in making up its judgment, and it might well have found that the lumber turned over to plaintiffs would not exceed the interest on the sums advanced on the purchase-money.

IV.

The other assignments as to the admission of evidence are abandoned in this court. It only remains to be considered whether plaintiffs were entitled to recover at all.

No instructions were asked or given, and we can only ascertain defendant's theory by the argument in the brief, and that is that plaintiffs only had "an executory contract in and for the lumber, and therefore the title to the same never passed." The contract of November 7, 1890, clearly established an agreement to sell plaintiffs the whole "cut" of defendant's mill at Clearwater for 1891. A sale and a purchase were unquestionably contemplated. Plaintiffs were to advance on their purchase $5.00 per thousand feet on the stock on hand, and the lumber company agreed to give a bill of sale on all stock in the stacks at the time the advance was made

So far the contract was executory, but when the lumber was sawed, separately stacked, and marked with Collins & Co.'s initials, and the stipulated advance payment of $5.00 per thousand feet paid down, and a formal unconditional bill of sale made and delivered to plaintiffs, reciting that this manufactured lumber so stacked to itself was "sold, marked, and delivered," then it became an executed sale and the title passed to plaintiffs, notwithstanding they owed the last payment or unpaid balance of the purchase-money when the lumber should be shipped out on the cars. The whole agreement indicated a sale, not a mere mortgage or equitable lien.

Plaintiffs were lumber merchants. They were buying stock for their business. They were not bankers or commission merchants, merely making a loan, but purchasers. When it is considered that Mr. Collins' evidence was not contradicted by any witness, but was corroborated to the fullest extent by the bills of sale, to the effect that when the money was advanced it was intended as a sale, and when he explains that defendant agreed to pay his interest because lumber was ordinarily sold on sixty days' time, and as defendant required the money in advance it agreed to pay plaintiffs the 3½ per cent. for the use of their money until it would be due, it is obvious that this alone would not constitute the transaction a mortgage, and the bills of sale were sufficient to support the replevin.

Symbolic delivery of property, as by bill of sale or warehouse receipts, is sufficient to vest title and a right to maintain replevin. Glasgow *v.* Nicholson, 25 Mo., 29; Traer *v.* Mullally, 12 M. A., 568; Bank *v.* Dearborn, 115 Mass., 221; Cobbey on Replevin, sec. 113; Wells on Replevin, secs. 194, 105, and 107.

As between the vendor and the vendee, no question of fraud being raised on the record, when this lumber was separately stacked, marked with Collins & Co.'s initials, and measured and a formal unconditional bill of sale was executed and delivered to plaintiffs the title to the lumber passed, notwithstanding plaintiffs still owed a balance, which was to be paid when they shipped the lumber out of Clearwater. Schwartz *vs.* Chappell, 19 Mo., 304; Locke *vs.* Hedrick, 24 Kansas, 763; Cleveland *vs.* Williams, 29 Texas, 205; Epstein *vs.* Drug Co., 82 Texas, 572. No other delivery was necessary to complete the same.

As to the claim set up, that the whole transaction was a mere equitable lien, it is not necessary to decide whether any evidence could be admitted to vary the nature of these instruments, as not one word was offered to substantiate that theory, nor is there a syllable to make good the allegation that these bills of sale were obtained by "covin and deceit." On the contrary, they were voluntarily executed in southeast Missouri and mailed to plaintiffs at St. Louis in pursuance of the previous written agreement. There was much evidence to sustain the plaintiffs' case and nothing whatever in rebuttal, and accordingly we affirm the judgment.

Burgess and Sherwood, J. J., concur.

JAS. B. GANTT, *Judge.*

(Record, page 209.)

And afterwards, to wit, on the 27th day of May, 1895, the further following proceedings were had in said cause, viz:

C. F. COLLINS & Co., Resp.,
v.
WAYNE LUMBER Co., App.

* * * * * * *

Come now the said appellants, by attorneys, and file their motions for rehearing herein.

Which said motion for rehearing is in the words and figures as follows, viz:

In the Supreme Court of Missouri, Division No. 2.

C. F. COLLINS & COMPANY, Respondents,
vs.
WAYNE LUMBER COMPANY, Appellant. } No. 6892.

Now comes the appellant and moves the court to set aside its finding and judgment in the above cause and grant a rehearing herein, and as grounds therefor states the following:

First.

Because it seems to be clear that the court has overlooked a part and misconstrued the whole of the testimony.

Second.

The defendant had a right to withdraw and abandon its demurrer to plaintiffs' evidence at any time before the court delivered its opinion. The right to "plead over" applies as well to a demurrer to the testimony as to a demurrer to a pleading.

The defendant withdrew its demurrer before any decision by the court, as appears at page 212 of the transcript, and it is submitted that it had the right to do this the next minute after the demurrer was tendered or six months afterwards, so that it was done before a final adjudication. The demurrer was tendered in good faith and with no thought or purpose of delaying the court in its business or of defeating the administration of justice.

Third.

Appellants submits that there is nothing in the record that warrants the conclusion of this court that the trial court found the value of 71,222 feet of lumber carried away by plaintiffs to be due to them in the nature of interest, because there was no finding at all as to this particular lumber and no inquiry whatever as to its value or its kinds or grades. There was no interest due at the time of the institution of the action, for the bill of sale of February 15th, 1891, provided that the $5,000.00 therein expressed should be

paid six months after date, and in no event, therefore, could it become due before the 15th of August, 1891, and this action was commenced on the 12th of August, 1891.

The interest on the other advances of May and June is not yet due, because the plaintiffs abandoned the contract on the 6th day of July and refused to make the advance by it required, and from thence hitherto *has* refused to take the lumber as provided by the contract, and because no time was fixed by these bills of sale for the payment of the interest on the advances of May and June, amounting to $8,400.00 altogether, and so we again especially urge the court to rehear this case because the plaintiffs were not entitled to any interest at the time of the institution of the suit. Even three days afterwards *it* could only be entitled under the contract to $175.00 as interest, and so the trial court had no right to make a seizure of $1,750.00 worth of defendant's property "in the nature of interest" or otherwise. The record being wholly silent as to "interest" or damages in the "nature of interest," the finding of this court, it is respectfully submitted, is purely conjectural, unwarranted, and operates to deprive appellant of its property without due process of law and without any authority of law whatever, for defendant's bond approved stands in lieu of the property—it is a good bond for $40,000.00—and plaintiffs should have been required to either return the property carried away or account for its value. Thus, if the present judgment should be permitted to stand, plaintiffs would receive as a money judgment, which they elected to take, the value which they had in the lumber and in addition to 71,222 feet of lumber which the sheriff seized under the writs of replevin and which was turned over by him to the plaintiffs. When the plaintiffs in the court below elected to take a money judgment, and that money judgment was fixed at the amount which they had advanced upon the lumber, the lower court should have diminished that amount by the value of the 71,222 feet of lumber which it was admitted plaintiffs had received under the writ. No question of interest was raised in the court below or appears in the record, and it is manifestly unjust, in the absence of any testimony as to the value of this 71,222 feet of lumber, to assume that the court below threw that in for interest.

When the delivery bond was given this property, which had been taken under the writ, should have been returned to plaintiffs, or, upon failure to do so, the court below should have taken evidence of its value and credited that amount upon plaintiffs' interest in the whole lumber. If the judgment as entered should be permitted to stand, it causes to defendant the total loss of the value of 71,222 feet of lumber and is equivalent to depriving defendants of their property without due process of law, or at least without any compensation therefor.

This case should be reversed and remanded if only for the purpose of ascertaining the value of that 71,222 feet of lumber.

Respectfully submitted.

C. D. YANCEY,
Att'y for Appellant.

(Record, page 212.)

And afterwards, to wit, on the 4th day of June, 1895, the further following proceedings were had in said cause, viz:

C. F. COLLINS *et al.*, Resp.,
v.
WAYNE LUMBER CO., App.

* * * * * * *

Now, at this day, the court, having fully considered and understood the motions heretofore filed for rehearings herein, doth order that said motions be, and the same are hereby, denied.

And afterwards, to wit, on the 8th day of June, 1895, the further following proceedings were had in said cause, viz:

C. F. COLLINS *et al.*, Resp.,
v.
WAYNE LUMBER CO., App.

Comes now the said appellant, by attorney, and files its motion to transfer this cause to the court in banc.

(Record, page 213.)

Which said motion to transfer to court in banc is in words and figures as follows, to wit:

In the Supreme Court of Missouri, April Term, 1895.

C. F. COLLINS *et al.*, Respondents,
vs.
WAYNE LUMBER COMPANY, Appellant. } No. 6892. Division No. 2.

Comes now the appellant, Wayne Lumber Company, and moves this division of the court to transfer this cause to the court in banc for the following reasons:

I.

If the present judgment in this cause should be permitted to stand, it amounts to giving valuable property of the defendant to the plaintiffs without any compensation therefor.

II.

Because such judgment violates the property rights of the defendant as guaranteed by sections 20 and 30 of the bill of rights of the constitution of Missouri and the fifth amendment to the Constitution of the United States.

III.

That, in view of the importance of this question, the matter should be passed upon by the whole court instead of one division thereof, and to the end that justice may be done and not defeated.

IV.

The actual value of the property taken is wholly immaterial, since if the right exists to deprive defendant of a single piece of lumber of the smallest value without due compensation the same right could be applied to its entire property of every kind and character.

V.

The forthcoming bond given in a replevin suit stands in lieu of the property seized, and plaintiff- *has* no right to hold the property or any part thereof and at the same time recover on the bond, and such a recovery as was had in this case is violative of the provisions of the constitutions of this State and of the United States, to which we have heretofore called attention.

It is respectfully and earnestly urged, therefore, in the interest of justice and right, that this cause be transferred to court in banc, that a full hearing may be had before the full bench of the constitutional questions which we have raised in the court below, in this court on the original hearing and on the motion for rehearing, and are now again insist*ed* upon.

Respectfully submitted.

C. D. YANCY,
Attorney for Appellant.

Copy received June 7, 1895.

DICKSON & SMITH,
For Respondents.

(Record, page 215.)

And afterwards, to wit, on the 18th day of June, 1895, the further following proceedings were had in said cause, viz:

C. F. COLLINS *et al.*, Resp.,
v.
WAYNE LUMBER CO., App.

Now, at this day, the court here, having fully considered and understood the motion heretofore filed to transfer this cause to the court in banc, doth order that said motion be, and the same is hereby, denied.

* * * * * * *

Office Supreme Court U. S.
FILED.
APR 6 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 727.

THE WAYNE LUMBER COMPANY,
Plaintiff in Error,
vs.
CALVIN F. COLLINS AND FRANK C. BREWER,
SURVIVING PARTNERS OF C. F. COLLINS & COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Brief and Argument for Defendants in Error on Motion to Dismiss or Affirm.

JOSEPH DICKSON,
ELENEIOUS SMITH,
For Defendants in Error.

NOTICE OF MOTION.

TO MESSRS. HOUGH & HOUGH,
Counsel for Plaintiff in Error.

You are hereby notified that the within motion, with the brief and argument annexed thereto, will be presented to the Supreme Court of the United States on Monday, the 20 day of April, 1896, at the convening of said court.

(Signed), JOSEPH DICKSON,
ELENEIOUS SMITH,
Counsel for Defendants in Error.

IV.

The actual value of the property taken is wholly immaterial, since if the right exists to deprive defendant of a single piece of lumber of the smallest value without due compensation the same right could be applied to its entire property of every kind and character.

V.

The forthcoming bond given in a replevin suit stands in lieu of the property seized, and plaintiff has no right to hold the property or any part thereof and at the same time recover on the bond, and such a recovery as was had in this case is violative of the provisions of the constitutions of this State and of the United States, to which we have heretofore called attention.

It is respectfully and earnestly urged, therefore, in the interest of justice and right, that this cause be transferred to court in banc, that a full hearing may be had before the full bench of the constitutional questions which we have raised in the court below, in this court on the original hearing and on the motion for rehearing, and are now again insisted upon.

Respectfully submitted.

C. D. YANCY,
Attorney for Appellant.

Copy received June 7, 1895.

DICKSON & SMITH,
For Respondents.

(Record, page 215.)

And afterwards, to-wit: on the 18th day of June, 1895, the further following proceedings were had in said cause, viz:

C. L. COLLINS *et al.*, Respts.,
vs.
WAYNE LUMBER CO., Appt.

Now, at this day, the court here having fully considered and understood the motion heretofore filed to transfer this cause to the court in banc, doth order that said motion be, and the same is hereby, denied.

Supreme Court U. S.
FILED.
APR 6 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 727.

THE WAYNE LUMBER COMPANY,
Plaintiff in Error,

vs.

CALVIN F. COLLINS AND FRANK C. BREWER,
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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Brief and Argument for Defendants in Error on Motion to Dismiss or Affirm.

JOSEPH DICKSON,
ELENEIOUS SMITH,
For Defendants in Error.

NOTICE OF MOTION.

To MESSRS. HOUGH & HOUGH,
Counsel for Plaintiff in Error.

You are hereby notified that the within motion, with the brief and argument annexed thereto, will be presented to the Supreme Court of the United States on Monday, the 20 day of April, 1896, at the convening of said court.

(Signed), JOSEPH DICKSON,
ELENEIOUS SMITH,
Counsel for Defendants in Error.

A. R. FLEMING & CO., PRINTERS, 522 N. Third Street, ST. LOUIS, MO.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 727.

THE WAYNE LUMBER COMPANY,
Plaintiff in Error,

vs.

CALVIN F. COLLINS AND FRANK C. BREWER,
SURVIVING PARTNERS OF C. F. COLLINS & COMPANY.

MOTION TO DISMISS OR AFFIRM.

And now come the defendants in error, and move the court to dismiss the writ of error herein for the following reasons:

1st. This court has no jurisdiction of this case.

2d. There is no Federal question arising on the record filed in this court, and no Federal question was actually decided by the court below, or necessarily involved in the judgment by it rendered.

3d. No Federal question was sought to be raised in the Supreme Court of Missouri until after its judgment was rendered.

Or to affirm the judgment of the Supreme Court of Missouri herein, on the grounds:

1st. Although the record may show this court has jurisdiction, it is manifest that the writ of error was taken only for delay.

2d. That, although the record may show that this court has jurisdiction, the question on which the jurisdiction depends is so frivolous as not to need further argument.

(Signed), JOSEPH DICKSON,
ELENEIOUS SMITH,
Counsel for Defendants in Error.

STATEMENT.

The present case is an ordinary action of replevin, instituted August 12th, 1891, in the Circuit Court of Wayne County, Missouri, to recover a large quantity of lumber. The usual order of delivery was made, and in pursuance thereof the sheriff seized such of the lumber as could be identified, and thereupon proceeded to deliver the same to the plaintiffs. After so delivering 71,222 feet of lumber a forthcoming bond was executed by defendant, and the remainder of the lumber was returned by the sheriff to defendant (Abstract of Record, p. 10). Answer and counter-claims were subsequently filed in due course by defendant. The defenses were based upon the alleged fraudulent character of certain bills of sale held by plaintiffs (Abstract, pp. 10, 11). No Federal question was raised, or even suggested, in the answer and counter-claims. The case was heard by the trial court without a jury, and no declarations of law, excepting a general demurrer to the evidence, were asked by either side. Judgment was rendered in favor of the plaintiffs (Abstract, p. 13).

Motion for a new trial was duly filed. It raised no Federal question, and the only language it contains, which may in anywise be said to hint at the point upon which the present writ of error is sought to be sustained, is as follows: "Seventh. Because the sheriff's return herein discloses the fact, and the fact is true, that plaintiffs took and carried away six carloads of lumber, amounting to 71,222 feet, and there is no evidence to show the value of the same, or its amount or dimensions." Motion for new trial was overruled (Abstract, p. 17).

The case was carried on appeal to the Supreme Court of Missouri, and the judgment of the lower court affirmed and opinion filed (Abstract, pp. 26–34). A motion for rehearing was filed in the Supreme Court. The only language in the motion for rehearing which contains a possible suggestion of a Federal question, is the following: "If the judgment, as entered, should be permitted to stand, it causes to defendant a total loss of the value of 71,222 feet of lumber, and is equivalent to depriving defendants of their property without due process of law, or at least without any compensation therefor" (Abstract, pp. 35, 36). The motion for rehearing war overruled (Abstract, p. 37). Thereupon defendants filed a motion to transfer the cause to the court in *banc*. This motion contained, among other reasons alleged, the following: "II. Because such judgment violates the property rights of the defendant, as guaranteed by sections 20 and 30 of the Bill of Rights of the Constitution of Missouri, and the Fifth Amendment to the Constitution of the United States." * * * * * "V. The forthcoming bond given in a replevin suit stands in lieu of the property seized, and

plaintiff has no right to hold the property, or any part thereof, and at the same time recover on the bond, and such a recovery as was had in this case is violative of the provisions of the Constitutions of this State and of the United States, to which we have heretofore called attention" (Abstract, pp. 37, 38). This motion was also overruled (Abstract, p. 38). Thereupon the case was brought to this court by writ of error. The only assignments of error in this court, which suggest Federal questions, are the following: "III. Because such judgment violates the property rights of the defendant, as guaranteed by sections 20 and 30 of the Bill of Rights of the Constitution of Missouri, and the Fifth Amendment of the Constitution of the United States." * * * * "VI. The forthcoming bond given in a replevin suit stands in lieu of the property seized, and plaintiff has no right to hold the property, or any part thereof, and at the same time recover on the bond, and such a recovery as was had in this case is violative of the provisions of the Constitution of this State and of the United States, to which we have heretofore called attention" (Abstract, pp. 1, 2).

POINTS AND AUTHORITIES.

I.

When a Federal question is presented for the first time in a petition for rehearing, it is not properly raised so as to authorize the Supreme Court of the United States to review the decision of the State court.

Bushnell vs. Crooke Mining Co., 148 U. S. 689;

Susquehanna Boom Co. vs. West. Branch Boom Co., 110 U. S. 57;
Morrison vs. Watson, 154 U. S. 111;
Miller vs. Texas, 153 U. S. 535;
Duncan vs. Missouri, 152 U. S. 378.

II.

In order to give this court jurisdiction to review a Federal question it must affirmatively appear that it was presented for decision by the State court and actually decided, or that the judgment could not have been rendered without deciding it.

California Powder Works vs. Davis, 151 U. S 392;
Parmelee vs. Lawrence, 11 Wall. 36;
Bolling vs. Lersner, 91 U. S. 594;
Citizens' Bank vs. Board of Liquidation, 98 U. S. 140;
In re Robertson, 156 U. S. 183.

III.

Where the decision of the State court is upon an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question.

Hammond vs. Johnston, 142 U. S. 72;
New Orleans vs. N. O. W. W. Co., 142 U. S. 79;
N. Y. & N. E. R. R. vs. Woodruff, 153 U. S. 689;
Haley vs. Breeze, 144 U. S. 130.

ARGUMENT.

The single point upon which it is sought to have this court review the decision of the Supreme Court of Missouri rests upon the following facts, as shown by the record: Under the order of delivery the sheriff seized as much of the lumber described in the order as could be identified, and proceeded, in accordance with the command of his process, to deliver the same to plaintiffs. After he delivered to plaintiffs 71,222 feet (about six carloads), defendant exercised its right to give a forthcoming bond in the ordinary form, and the sheriff thereupon released to defendant the lumber that remained in his custody. Plaintiffs at the trial proved by an expert witness (F. C. Brewer, whose testimony in so far as material to the present inquiry will be found on page 18 *et seq.* of the Abstract), the values of all the different kinds of lumber seized. It lay in the power of the defendant to contradict this testimony, if untrue, and to produce evidence showing the exact value of the six carloads turned over to plaintiffs before the forthcoming bond was delivered. Not a word of testimony was offered by it on this subject, and no declaration of law touching the matter was asked. As a matter of fact, full credit was given defendant for the six carloads of lumber, and the following language used by the Supreme Court of Missouri in its opinion (Abstract, p. 33) shows that it was clear to that court that proper credit had been given, and the manner in which it was given is explained.

"III. There was likewise no evidence of the value of the 71,222 feet of lumber turned over by the sheriff to respondents. The claim now made that it was

worth $1,750 is not supported by the proofs. There is no evidence either as to the dimensions or value of this lot of lumber. The history of the proof on this question is this: The witness Brewer presented the court with a schedule of prices, showing what all the lumber seized by the sheriff was worth. This estimate included the 71,222 feet, and tended to prove the aggregate value of the lumber levied on was $25,663.64. The court, after making all allowances, at first rendered a judgment for plaintiff for $19,360. Subsequently, on the motion for new trial, the respondents, taking the view that under the decisions of this court they were entitled to recover in replevin to the extent of their actual interest, and, having elected to take a money judgment, consented to remit all exceeding their interest in the lumber. *The evidence shows advances in cash to the amount of $13,000, exclusive of interest, which the evidence all shows defendant agreed to pay, and it must be presumed the court took these items into consideration in making up its judgment, and it might well have found that the lumber turned over to plaintiffs would not exceed the interest on the sums advanced on the purchase money.*"

On what possible basis can it be claimed that a Federal question is here involved? The order of delivery commanded the sheriff, in the event of refusal on the part of defendant to turn over the lumber to him, "to take such property from the possession of the said defendant and deliver the same to the said plaintiff." It was in exact obedience to the commands of this order that the 71,222 feet were seized by the sheriff and properly delivered to the plaintiffs. Does not an order of delivery and compliance with its terms constitute

"due process of law," within the meaning of the Federal Constitution? The real complaint of the defendant, which the Supreme Court of Missouri shows has no foundation whatever, is that credit was not given it for the lumber turned over to plaintiffs. This is a matter which the State court alone has power to consider in a case such as the present, and no more involves a Federal question than if a State court improperly refused to give one credit in an action for the purchase price of an article for a sum of money paid on account of such purchase price.

Assuming, however, that the question suggested is a Federal question, we submit the record does not, under the uniform decisions of this court, present it in such a form as gives this court jurisdiction to entertain it.

No suggestion was made in the trial court that the act complained of amounted to taking of property without due process of law, and it was apparently never thought of until defendant found it necessary to file a motion for rehearing in the Supreme Court of Missouri. In that motion it was said: "If the judgment, as entered, should be permitted to stand, it causes to defendant the total loss of the value of 71,222 feet of lumber, and is equivalent to depriving defendants of their property without due process of law, or at least without any compensation therefor." Whether this complaint is based upon the provisions of the Federal or State Constitution does not appear. A Federal question cannot be raised in this way.

"The attempt to raise for the first time a Federal question in a petition for rehearing after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly

decided by this court that a Federal question, when suggested for the first time in a petition for rehearing after judgment, is not properly raised so as to authorize this court to review the decision of the highest court of the State."

Bushnell vs. Crooke Mining Co., 148 U. S. 689.

In *Susquehanna Boom Co. vs. West Branch Boom Co.*, 110 U. S. 57, this court says, dismissing a writ of error to the Supreme Court of the State of Pennsylvania (p. 59):

> "The fact that on a petition for rehearing it was suggested that if the charter of the Western Branch Company was so construed as to give it the right to maintain its sheer boom in the north half of the stream, that charter would impair the obligation of the contract of the State with the Susquehanna Company, is unimportant here, because our jurisdiction extends only to a review of the judgment as it stands in the record. We act on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment, on a petition for rehearing. Such a petition is no part of the record on which the judgment rests."

So, also, in *Morrison vs. Watson*, 154 U. S. 111, this court, dismissing a writ of error to the Supreme Court of the State of North Carolina, says (p. 115):

> "In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a State, on the ground that it decided against a title, right, privilege or immunity, claimed under the Constitution, or a treaty or statute of the United States, such title, right, priv-

> ilege or immunity must have been specially set up or claimed at the proper time and in the proper way." * * * "if it was not claimed in any form before judgment in the highest court of the State, it cannot be asserted in this court."

"When the record in a case brought by writ of error from a State court shows nothing of what took place in the State court of original jurisdiction, and in the appellate court no objection raising a Federal question during the trial and before judgment, but such question is raised for the first time in the appellate court on motion for rehearing, the writ of error must be dismissed upon the ground that the Federal question is not properly presented by the record."

Miller vs. Texas, 153 U. S. 535.

But plaintiff in error will say that it was raised specifically in the Supreme Court of Missouri, and will refer to the language of the motion made to transfer the case to the court in *banc* after the overruling of the motion for a rehearing. This court has expressly decided that the question cannot be so raised.

In the case of Duncan vs. Missouri, 152 U. S. 378, the Federal question was not suggested until after judgment, and after an application for rehearing had been overruled, and only then in the form of a motion in the Supreme Court of Missouri to transfer the case to the court in *banc*. The writ was dismissed.

In order to give this court jurisdiction to review a Federal question, such question must have been actually decided, or it must appear that the judgment could not have been rendered without deciding it.

Chief Justice Fuller, in the case of the California Powder Works vs. Davis, 151 U. S. 393, says: "It is axiomatic that in order to give this court jurisdiction on a writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that this decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court, without considering any Federal question that may also have been presented."

"The conflict of the State law with the Constitution of the United States, and a decision by a State court in favor of its validity, must appear on the face of the record before it can be re-examined in this court. It must appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court. It must be that such a question was necessarily involved in the decision, and that the State court would not have given a judgment without deciding it."

Parmelee vs. Lawrence, 11 Wall. 36.

"We cannot re-examine the judgment or decree of a State court simply because a Federal question was presented to that court for determination. To give us jurisdiction it must appear that such a question was in

fact decided, or that its decision was necessarily involved in the judgment, or decree, as rendered."

Bolling vs. Lersner, 91 U. S. 594.

And again: "We have often decided that it is not enough to give us jurisdiction over the judgment of the State courts for a record to show that a Federal question was argued, or presented, to that court for decision. It must appear that its decision was necessary to the determination of the case, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it."

Citizens' Bank vs. Board of Liquidation, 98 U. S. 140.

The Supreme Court of Missouri has decided that full credit has been given for the lumber rightfully turned over to the plaintiffs before the giving by defendant of bond, by setting the value of the same off as against interest to which plaintiffs were entitled, and which the lower court did not give them. The decision is, therefore, upon a ground wholly independent of one involving a Federal question, and broad enough to sustain the judgment. That independent ground is one which only necessitates an application of the simple rules of arithmetic. The witness Brewer gave the values of the different kinds of lumber. The court had only to take the highest, or, if it thought proper, the average value, and estimate the value of the six carloads which plaintiffs received, and then calculate the interest to which plaintiffs were entitled, and use one result as against the other.

In Hammond vs. Johnston, 142 U. S. 72, in an opinion by Chief Justice Fuller, this court says: "It is well settled that where the Supreme Court of a State decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question. Hopkins vs. McLure, 133 U. S. 380; Hale vs. Akers, 132 U. S. 554; Henderson Bridge Co. vs. Henderson City, 141 U. S. 679."

If it appear in a case brought here in error from a State court that the decision of the State court was made upon rules of general jurisprudence, or that the case was disposed of there on other grounds broad enough in themselves to sustain the judgment without considering the Federal question, and that such question was not necessarily involved, the jurisdiction of this court will not attach.

New Orleans vs. New Orleans W. W. Co., 142 U. S. 79.

In order to give this court jurisdiction by writ of error to a State court, it must appear by the record that a Federal question was raised. And even if the Federal question was raised in the State court, yet if the case was decided on grounds broad enough in themselves to sustain the judgment without reference to the Federal question, this court will not entertain jurisdiction.

N. Y. & N. E. R. R. vs. Woodruff, 153 U. S. 689.

In Haley vs. Breeze, 144 U. S. 130, the writ was dismissed because there was no Federal question, and because the judgment of the State court rested upon an independent ground broad enough to maintain it and involving no Federal question.

We confidently assert that not only was no Federal question decided by the State courts, but that none was raised, or could have been raised, under the record in this case.

In conclusion, we beg to say that defendants in error have now for more than four and a half years been seeking, through one of the simplest actions known to the law, to obtain their rights, which the State courts at every step, and after every form of legal opposition that could be conceived of, have declared they are entitled to. We feel this court will see, on but a short inspection of the record, that the present writ was sued out merely for delay, and believe we are justified in asking that the same be dismissed, or the judgment of the Supreme Court of Missouri be affirmed, with damages for delay, as provided by the rules of this court.

Respectfully submitted,

JOSEPH DICKSON,
ELENEIOUS SMITH,
Attorneys for Defendants in Error.

Office Supreme Court U. S.
FILED.
APR 30 1896
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895

THE WAYNE LUMBER CO.,
Plaintiff in Error,

vs.

CALVIN F. COLLINS AND FRANK C. BREWER, SURVIVING PARTNERS OF C. F. COLLINS & CO.,
Defendants in Error.

No. 727.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

SUGGESTIONS IN OPPOSITION TO MOTION TO DISMISS.

WARWICK HOUGH,
WARWICK M. HOUGH,
For Plaintiff in Error.

A. R. FLEMING & CO., PRINTERS, 522 N. Third Street, ST. LOUIS, MO.

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We confidently assert that not only was no Federal question decided by the State courts, but that none was raised, or could have been raised, under the record in this case.

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Respectfully submitted,

JOSEPH DICKSON,
ELENEIOUS SMITH,
Attorneys for Defendants in Error.

Office Supreme Court U. S.
FILED.
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IN THE

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OCTOBER TERM, 1895

THE WAYNE LUMBER CO.,
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WARWICK M. HOUGH,
For Plaintiff in Error.

A. R. FLEMING & CO., PRINTERS, 522 N. Third Street, ST. LOUIS, MO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE WAYNE LUMBER CO.,
Plaintiff in Error,

vs.

CALVIN F. COLLINS AND FRANK C. BREWER, SURVIVING PARTNERS OF C. F. COLLINS & CO.,
Defendants in Error.

No. 720.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

SUGGESTIONS IN OPPOSITION TO MOTION TO DISMISS.

STATEMENT AND ARGUMENT.

The extracts from the transcript of the record in this cause, filed by the defendants in error, fairly present all the material points of the case, except the assignment of errors, which under the rules was filed by the plaintiff in error in the Supreme Court of Missouri

(before argument and before judgment therein), with its brief and argument, the material parts of which are as follows, and which is here inserted by agreement of counsel, to be considered as part of the record:

ASSIGNMENT OF ERRORS.

"Upon this record defendant respectfully assigns as errors the following:

I.

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II.

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III.

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IV.

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V.

The court, under the evidence and in view of the pleadings, committed error in refusing to find the value of the six carloads of lumber, taken and carried away by plaintiffs under the writ in this cause, and amounting to 71,222 feet, and in refusing to receive any testimony tending to show that the value of the same or its kind, character or quality; and which 71,222 feet, or its value, was demanded in defendant's answer.

The said lumber being of the actual market value, at the time of its wrongful asportation by the plaintiffs, of $1,750.

VI.

And the court further erred in its refusal to assess the value of the 71,222 feet so by the plaintiffs taken and carried away as aforesaid, in that plaintiffs obtained defendant's property without consideration, and without due process of law, in that defendant had given a good and sufficient bond for all of the property in contention, and embraced in the writ, and was, as of course, entitled to the return of it all, and if return of the 71,222 feet could not be had, and if the judgment for $13,400 must stand, there should be a finding as to how much the 71,222 feet was worth, and the judgment reduced by what that value may be, and for that, defendant has been deprived of its property without due process of law, in violation of its rights as a citizen, as guaranteed by the provisions of article 5 of the amendments to the Constitution of the United States of America, and in violation of the rights guaranteed to it under the provisions of section 21, of article II, of the Constitution of Missouri, and the statutes of this State."

This point was incidentally, though not as squarely raised in the motion for a new trial filed by the plaintiff in error in the trial court, as follows:

"Seventh. Because the sheriff's return herein discloses the fact, and the fact is true, that plaintiffs took and carried away six carloads of lumber, amounting to 71,222 feet, and there is no evidence to show the value of the same, or its amount or dimensions."

In view of the foregoing, therefore, the defendants in error are *in error* indeed, in basing their motion

upon the fact that the Federal question was not presented to the Supreme Court before the motion for a rehearing, and for transferrence to the court *in banc*.

Under the rules, the question was so raised as to entitle plaintiff to a hearing on the point by the Supreme Court, and the judgment *as rendered* could not have been so rendered without ignoring such right, or practically deciding against it; nor was there any other ground upon which the judgment as rendered could have been rendered without considering that Federal question; and the necessary effect in law of the judgment as rendered, was the denial of a right claimed under the Constitution of the United States.

Therefore, while we do not dispute the law, as settled by the authorities cited by the defendants in error, we do insist that they are not applicable to this case.

The authorities under subdivision I refer to cases where the Federal question is presented for the first time in a petition for a re-hearing *after judgment* in the Supreme Court. Such is not the case here.

The authorities under subdivision II refer to cases where the judgment *as rendered* could have been rendered without passing upon the rights set up. Such was not the case here, because the right was actually set up in the assignment of errors before judgment in the Supreme Court, and the opinion of the court shows that it was passed upon adversely to plaintiff in error, and the judgment as rendered could not have been rendered without passing upon the point.

The authorities under subdivision III refer to cases where, while the Federal question may have been duly raised, the judgment as rendered was based upon

grounds other than those set up as a Federal question. Such was not the case here.

What we think is the only question in the case, we respectfully submit, is, whether or not the retention of the 71,222 feet of lumber by defendants in error, after the giving of a forthgoming bond, was not a deprivation of the property of plaintiff in error, without due process of law.

We contend that it was, and it was none the less so, that plaintiff in error was willing to have the judgment that defendants in error were entitled to, reduced by the value of the lumber which they had thus unlawfully retained. The issuance of a writ of replevin is due process of law to that extent, but it does not invest with legality all that may be done thereafter.

The evidence in this case shows, that before the giving of the forthcoming bond the sheriff had delivered to the defendants in error (plaintiffs in the case below) 71,222 feet of lumber. The forthcoming bond, which was given, covered all of the lumber mentioned in the writ, and, upon the giving of it, defendant in the replevin suit (plaintiff in error here) was entitled to the return of all the property which had been seized. The retention of a part was a deprivation without due process of law, and contrary to law, because there is no process by which a plaintiff in a replevin suit is entitled to retain *a part* of the property seized after the giving of a forthcoming bond, covering *the whole*. The retention, therefore, of a part, amounted to conversion.

It appears from the record that in the trial court the case proceeded as though all of the property seized under the writ of replevin had been returned upon the

giving of a forthcoming bond, and no notice was taken of the fact that 71,222 feet of lumber had not been returned, nor was there any assessment of the value of that lumber.

The evidence shows that the interest of defendants in error (plaintiffs below) in the property replevined, amounted to $13,400, and the judgment was entered for that amount. This could only have been upon the theory that all the property had been returned upon the giving of a forthcoming bond, yet the Supreme Court of Missouri, in a manner unwarranted by the evidence and the law, disposes of the claim of plaintiff in error that it is being deprived of property without due process of law, by saying that the trial court might have thrown that lumber in for interest, and that, too, after the statement by the court that there was no evidence of the value of the 71,222 feet. The answer to this is, that the trial court did not do anything of the kind, nor did it even consider the 71,222 feet of lumber, and the record so shows.

Defendants in error, in their brief, comment upon the fact that the real complaint of plaintiff in error is, that due credit was not given it for the lumber turned over to the plaintiffs in the replevin suit, and not returned upon the giving of a forthcoming bond.

The answer to that is, that many a man who has been deprived of his property without due process of law, is yet willing to accept a money value in lieu of it; but that such willingness is no concession that the property was taken by due process of law. In concluding their brief, defendants in error appeal to the sympathies of the court in their effort to sustain their claim, but we respectfully submit that the right of the

plaintiff in error to the property, or its value, which defendants in error have retained without due process of law, and which right the Supreme Court of Missouri has denied, after the question was fairly and squarely presented to it before judgment, is as much to be considered by a court of justice as any right claimed by the defendants in error, though the amount involved may be less.

We respectfully submit not only that the motion should be denied, but that the errors complained of are sufficient to reverse the judgment.

WARWICK HOUGH,
WARWICK M. HOUGH,
For Plaintiff in Error.